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A

FAIR TRIAL

OF THE

IMPORTANT QUESTION,

OR THE

RIGHTS of ELECTION ASSERTED;

AGAINST THE

DOCTRINE of INCAPACITY by EXPULSION, or by RESOLUTION:

UPON

True Conſtitutional PRINCIPLES, the Real LAW of PARLIAMENT, the COMMON RIGHT of the SUBJECT, and the DETERMINATIONS of the HOUSE of COMMONS.

IN WHICH,

Two PAMPHLETS, entituled, *The Caſe of the late Middleſex Election, Conſidered,* &c.—And, *Serious Conſiderations upon a late Important Determination,* are very fully examined and anſwered.

WITH

SOME OCCASIONAL STRICTURES.

Erga Civitatem ac Cives optime ille ſe gerit, qui omni Victoriæ quæ in Olympicis, aliiſque tam Belli quam Pacis certaminibus comparatur, illam Gloriam antepouit, quam PATRIIS LEGIBUS *miniſtrando nanciſcitur, atque in hoc Miniſterio cæteris omnibus per totam vitam præſtare conabitur.*

PLAT. DE LEG.

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M DCC LXIX.

A

FAIR TRIAL

OF THE

IMPORTANT QUESTION, &c.

IF the people of *England* ſhall ever come to be in ſo benumbed a ſtate, as not to feel, and to ſhew they feel, any real invaſion of their eſſential rights and privileges, the body politic muſt then be far advanced in a general mortification, that can end in nothing leſs than the death of Liberty. An indifference, even to the great concerns of freedom, would be but a bad ſymptom in a free ſtate; and rather argue, that the conſtitution was not in it's natural ſoundneſs and vigour. Liberty and power are naturally as jealous of one another, as any two ſtates can be of their ſeveral encroachments. They ought not, however, to part for ſmall bickerings, but ſhould bear little jealouſies without breaking for them.

That the liberties of this country are not yet arrived at the moſt dangerous ſtage of a decay, late occurrences have ſufficiently proved: And amongſt the ſigns of the national ſenſe of the value and importance of great conſtitutional rights, may be numbered two laboured publications, in

defence of the late determination in the caſe of the election of Middleſex; the profeſſed deſign of both which is, to prevent the public from being miſled by thoſe who have an intereſt to impoſe upon them, and to guard them againſt falſe repreſentations, and alarms of vain apprehenſions.

The authors of theſe two performances have acquainted us with their motives for ſending into the world their thoughts upon the weighty ſubject they have handled. But there was no occaſion for an apology. The ſubject is worthy of any pen; and thoſe gentlemen had a right to ſupport an opinion, which, very probably, they had given in a ſituation of great reſponſibility.

A queſtion that could ſo divide the wiſdom of the nation, and that now engages the body of the people, is not a light matter. The proteſtation of almoſt all the repreſentatives of the landed intereſt, upon a point reſpecting the rights of election, deſerves very ſerious attention. Theſe are the vital parts of the conſtitution: If her cry is, *Omnes jurant me Jovis eſſe filium, ſed vulnus hoc mortalem eſſe me clamat*; ſhe ought to be heard, and her wounds healed.

The liberties of this country owe much to the parliamentary diſcuſſions and remonſtrances, on great and fundamental points, controverted in former days, when the diſpute was between the prince and the people, between the pretended prerogative of the crown, and the juſt rights of the ſubject.

Explanations of that ſort cannot in theſe days be repeated. The Revolution has taught the dulleſt apprehenſion the folly of ſuch unnatural ſtruggles. If our liberties ſuffer now, we muſt be the executioners ourſelves. 'Tis therefore but fit to warn one another of the danger to which the commonwealth may be expoſed, whether by the miſ-

conduct

conduct, or the misapprehension of momentous measures in the state. So far the Author of the *Case* had reason to say, he performed the duty of a good citizen, when on this occasion, he submitted to the judgment of the public, those reasons and authorities which had brought conviction to his own mind.

After his example, I propose to consider what he and the writer of the *Serious Considerations* have favoured us with; and, in doing it, I shall follow the Author of the *Case*, because in that way, hardly any thing can be missed that is material to be observed upon the *Considerations*.

In general, the *Case* appears to me to favour much of that bias, which men of the law have been said to have to their calling in the interpretations they make of the law. That sort of art seems to have been used, which able men in the profession, successfully employ to divert the attention from the essence of a difficult cause, by speaking to points very capable of being well supported, but which have no real influence upon the merits of the question under trial. This observation will justify itself in the sequel, in which, for the sake of perspicuity, and to be more distinct, I propose to prosecute the following method:

I. In the first place, I shall take a general survey of the whole argument of the Author of the *Case*, and point out what I apprehend to be a certain kind of confusion, and some particular fallacies that run through it; by which the Author's reasoning may mislead, but cannot, on it's own plan, be otherwise than very deficient and inconclusive.

II. Secondly, I shall more directly and precisely shew what is *not* the question; which will, in

effect, only be to ſhew what the Author ſubſtitutes in room of it.

III. Thirdly, I ſhall ſtate what the real queſtion is; and, for preventing all ambiguity, ſhall explain the terms neceſſary to the underſtanding of it.

IV. Fourthly, I ſhall lay down what I apprehend to be the principles and grounds, upon which the queſtion ought to be tried.

V. Fifthly, I ſhall endeavour to examine the queſtion as ſtated and explained upon thoſe grounds and principles.

VI. And laſtly, I ſhall beſtow a few words, to point out the real importance of the queſtion, and the danger of the propoſition, which I hope, in the argument, to prove to be erroneous.

The firſt thing propoſed was to take a general ſurvey of the whole argument of the Author of the *Caſe*, and to point out what I apprehend to be a certain kind of confuſion, and ſome particular fallacies that run through it, by which the Author's reaſoning may miſlead, but cannot, on its own plan, be otherwiſe than very deficient and inconcluſive.

Here I muſt content myſelf with ſome detached obſervations, and

Firſt, I obſerve that the profeſſed purpoſe of our Author is to vindicate from miſapprehenſion and miſrepreſentation the late determination of the Houſe of Commons: And " to this end he " propoſes (pages 2 § 3) " to ſhow from the " Records of Parliament, and the Authorities of " Law, that the Houſe of Commons is legally in- " veſted with the power they have exerciſed, with " reſpect to the late determination of the Election " for *Middleſex*."

" Farther,

" Farther, that on the general principles of " reaſon and conſtitutional policy, they ought to " have ſuch a power: And that, in the inſtance in " queſtion, they have exerciſed their power in a " juſt and conſtitutional manner, not only accord- " ing to the Law and Uſage of Parliament, but in " ſtrict conformity with the adjudications in the " courts of *Weſtminſter* on ſimilar occaſions."

If, by the firſt part, our Author means no more than what he afterwards (at the top of p. 7) undertakes to ſhow, not only from " the authorities " of the moſt antient and reſpectable lawyers, but " from the Records of Parliament, that the Houſe " of Commons have firſt, the ſole and excluſive " power of puniſhing their own members as ſuch, " either by commitment, expulſion or otherwiſe; " and ſecondly, the ſole and excluſive power of " examining and determining the rights and qua- " lifications of electors and elected, together with " the returns of writs for the election of Mem- " bers; and, in ſhort, all matters incidental to " ſuch elections:" I ſay, if our Author means no more than this, there may be a conſiſtency in his argument: And all that can be ſaid, is, that the Author is at immenſe labour to prove two propoſitions which I ſhall not deny, even as laid down by himſelf. But if our Author means, by what he *propoſes* in p. 2, that he is to ſhow that the Houſe of Commons legally are, and ought to be inveſted with a power, ſimply by a vote of their own, to make a Law of diſability, by which a perſon ſhall not only be deprived of his *ſeat*, but diſfranchiſed of his *eligibility:* I ſay, if our Author means this, he means a very different thing from that he firſt mentioned; though, perhaps, a thing more conſonant to the profeſſed end and deſign of his undertaking. And that this is what the author does mean and propoſe in p. 2, would appear from this very

very conſideration, that nothing elſe is to his purpoſe.

However, it is evident, that what will prove the two points propoſed to be proved in p. 7, will not prove what, in p. 2, is propoſed to be ſhown, if thereby is meant what is laſt above ſuppoſed.

There is therefore here a downright confuſion of terms, or rather of ideas. And if the reader is not more careful to attend to diſtinctions, than the Author has been to make them, he will in a miſt of words, be carried away to a proof of propoſitions not controverted, inſtead of a proof of the ſole point in diſpute; for evincing which the other propoſitions are of no avail.

Secondly, I obſerve in farther confirmation of the alledged confuſion of our Author's argument, that, after giving a detail of the proceedings in regard to Mr. *Wilkes*, which take up from the words above cited in p. 2, to the middle of p. 4, he there, by way of reſuming the thread of his diſcourſe, informs us, that "in order to ſhow that "the Houſe of Commons is legally inveſted with "the power they have exerciſed on this occaſion, "it will be neceſſary to explain the nature and "extent of the powers conſtitutionally veſted in "that Houſe;" from which it is plain, the only way to know what power our Author's argument tends to ſhow the Houſe of Commons to be inveſted with, is, by attending to his own account of the conſtitutional powers of the Houſe. Accordingly, let it be obſerved in the

Third place, That all the account our Author gives us of the conſtitutional powers of the Houſe of Commons, is this, "that jointly with the other "two eſtates, they have a power of legiſlation, and "that ſeparately and independently they have a "power of judicature;" and our Author tells us, (bottom of p. 6) "it will not be material on the

"preſent

"preſent occaſion, to enquire into the various ſub-
"jects over which the juriſdiction of the Houſe of
"Commons extends. It will be ſufficient, with
"regard to the queſtion now under conſideration,
"to ſhow (as above mentioned) that the Houſe
"have the ſole and excluſive power of puniſhing
"their own Members, and of examining and de-
"termining as to elections." Hence nothing can be more evident than this, that if the power of judicature in the Houſe of Commons, exerciſed in thoſe two inſtances, is not ſufficient to prove the Houſe to be *legally inveſted with the power they have exerciſed with reſpect to the late determination of the Middleſex Election*, it is *not* proved.

A fourth obſervation to be made, reſpects the ambiguity with which our Author expreſſes himſelf as to the *Law of Parliament*, of which our Author makes a ſovereign ſpecifick that can diſſolve the moſt ſacred rights of the ſubject, if they are but thrown into his ſtate crucible.

Our Author acquaints us (p. 4th, at the bottom) that, "the rule, and only rule, by which the "power of judicature (of the Houſe of Commons) "is directed, is the *Law of Parliament*, which is "part of the *Law of the Land*."

The pains taken to prove from Lord *Coke*, Lord *Cowper*, *Holt*, *Hale*, and other Judges, that there is a *Law of Parliament*, might have been ſpared. I agree that the *Lex & Conſuetudo Parliamenti*, is part of the Law of the Land. What it means, ſhall hereafter be conſidered. Our Author intends to convey this idea, that the Law of Parliament is the only *norma judicandi* in the exerciſe of the judicature of the Houſe of Commons; and, in p. 6. he teaches us, that "the Law of Parliament, in mat-
"ters thereby cognizable, is diſtinct from, and
"independent of all other Laws." By which it is clear he intends, that the Law of Parliament is

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the mere will of the Houſe of Commons. For, at the bottom of p. 12, he ſays, "Let it be admitted for a while, that expulſion does not of itſelf "create an incapacity of being re-elected; yet "ſtill it will appear, that the Houſe of Commons "not only as expoſitors of their own reſolutions, "but, as expoſitors of the *Common* and *Statute* Law "of the Land, in caſes where their juriſdiction "is competent, have a right to declare, who are, "and who are not eligible as Members of Parliament." "And that (he immediately adds) "leads to the next propoſition, which is, that "they have the ſole power of determining all "matters incident to elections." Which propoſition, though the only fountain from which the other doctrine is drawn, will juſt prove it as much as any propoſition whatever, the moſt remote from the ſubject. And the whole reſolves into this, that becauſe the Houſe of Commons are, as our Author calls them, the ſole expoſitors of the Law, they may make the Law to be what they pleaſe. The doctrine is in the ſtile of the Law of the twelve Tables, *uti dixiſſet, ita jus eſto.* But it is the reaſon of every Law, that no man's will, nor the will of any body of men, except in a legiſlative capacity, ſhould be a Law, or ſhould, in judicature, be a rule of judgment.

Our Author confounds the *power* with the *exerciſe* of judicature. But they are very diſtinct. The power of judicature is *juriſdiction*, or the right to judge. The exerciſe of judicature is the giving of judgment, or judicial acts. The Law of Parliament may be, and it is, the only rule by which the *juriſdiction*, or *power of judicature* of the Houſe of Commons is *directed*, i. e. ruled, modelled, aſcertained and eſtabliſhed: but the Law of Parliament is *not* the only rule by which the *exerciſe of the judicature* of the Houſe of Commons, meaning

ing their judgments or judicial acts, is directed. For the rule of judging will be different, *ſecundùm ſubjectam materiam*. The very matter of elections, which is the *Peculiar* of the juriſdiction of the Houſe of Commons, involves rights which muſt be judged of by the *common* and by the *ſtatute* Law.

In the very paſſage of Lord *Coke*, which is our Author's own authority, the poſition is, that "all weighty matters in any Parliament concern-"ing *the Peers of the Realm*, or Commons in "Parliament aſſembled, ought to be determined, "adjudged and diſcuſſed by the courſe of Parlia-"ment, and not by the civil Law, nor yet by the "common Laws of this Realm." Now ſurely the ſucceſſion or right to a Peerage, may be one of the weighty matters in Parliament moved concerning a *Peer of the Realm*, and it is ſo peculiar to the juriſdiction of the Houſe of Lords, that no other Court can meddle with it; but the common Law of the Realm would be the rule of judicature in that caſe. And moſt certainly (to uſe Lord *Coke*'s own words) "*a pari ratione*, the like is for the "Commons, for any thing moved or done in the "Houſe of Commons."

Why then did our Author uſe ambiguous terms? Only becauſe they could miſlead, and clear expreſſions would have cut up the very foundation of his poſition. He would not plainly and directly ſay, the *Law of Parliament* was the *only rule* of the *exerciſe of the judicature* of the Houſe of Commons. Common ſenſe, aſſiſted with a very little Law, was ſufficient to reject the notion. Yet what he had not courage to *ſay*, muſt be *underſtood*, or his argument was of no ſtrength. Therefore what could not be *avowed* was to be *couched*, and conveyed in a fog. For which reaſon he uſes the ambiguous term, *power of judicature*.

'Tis not unworthy of a remark too, that the words quoted by our Author from Lord *Coke*, are not in that part of his Treatiſe where he explains the *Lex & Conſuetudo Parliamenti*; but are taken from the article in which he profeſſedly treats of the *judicature* of parliament. But our Author went ſo far forward in the Book to find out the *uſeful* words Power of Judicature, to join them with what Lord *Coke* had ſome leaves before delivered as to the Laws and Cuſtoms by which the Court of Parliament, in general, not the Houſe of Commons in particular, *ſubſiſts*.

The inaccuracy of Lord *Coke*'s diction, particularly in the word *directed*, is even made ſubſervient to our Author's turn. But Lord *Coke* himſelf explains that word by the other *ſubſiſts*, which cannot poſſibly be applied to the exerciſe of judicature, or to any thing elſe but the *conſtitution* and *juriſdiction* of the Court of Parliament, i. e. of both Houſes in their ſeveral capacities *. It was not

* The whole paſſage which our Author has mutilated, will make this very clear. "As every Court of Juſtice (ſays Lord *Coke*) "hath Laws and Cuſtoms for its direction, ſome by the Com- "mon Law, ſome by the Civil and Canon Law, ſome by pe- "culiar Laws and Cuſtoms, ſo the High Court of Parliament, "*ſuis propriis legibus & conſuetudinibus, ſubſiſtit* [*it is Lex & "Conſuetudo Parliamenti*] * that all weighty matters [*in any "Parliament,*] moved concerning the Peers of the Realm, [*or "Commons in Parliament aſſembled,*] ought to be determined "and adjudged, and diſcuſſed by the Courſe of Parliament, and "not by the Civil Law, nor yet by the Common Laws of this "Realm [*uſed in more inferior Courts, which was ſo declared to "be ſecundùm legem & conſuetudinem parliamenti, concerning the "Peers of the Realm, by the King, and all the Lords Spiritual "and Temporal*] *and the like* [*pari ratione*] is for the Com- "mons, for any thing moved or done in the Houſe of Com- "mons; [and the rather, for that by the Law and Cuſtom of "Parliament, the King cannot take notice of any thing ſaid or "done in the Houſe of Commons; and every Member of the "Houſe

* The words incloſed within the [ ] are thoſe omitted by our Author.

not in the view of Lord *Coke* to define the rule of decision as to matters to be determined by the House of Commons, or to assert that the *Law of Parliament* was the only standard for the exercise of their judicature *, but merely to declare that the Parliament,

" House of Parliament hath a judicial place and can be no wit-
" ness.] And this is the reason that Judges ought not to give
" any opinion of a matter of Parliament, because it is not to be
" decided by the Common Laws, but secundùm legem & consu-
" etudinem parliamenti; and so the Judges in divers Parliaments
" have confessed; [and some hold that every offence committed
" in any Court, punishable by that Court, must be punished,
" proceeding criminally, in the same Court, or in some higher,
" and not in any inferior Court, and the Court of Parliament
" hath no higher.]"

Lord *Coke* here alludes only to the nature, subjects, peculiarities and exclusiveness of the jurisdiction of Parliament, and the particular mode of its proceeding by what is called the Course of Parliament. Its independency of the Crown, and its superiority to all other Courts, he chiefly has it in his eye to establish. What he says is applied equally to the House of Peers and the House of Commons, and to all matters of *legislation*, of *judicature*, or of *counsel*.

* Our Author, in a note, mentions as a proof that the Law of Parliament is the only rule of the judicature of the House of Commons, the record containing the answer given by the Judges, when consulted as to the release of some Members of the Commons, imprisoned while Parliament was not sitting, " that it was
" not their part to judge of the Parliament which was Judge of
" the Law." The Commons would not now put such a question in the reverence of the Judges, being merely a matter of privilege. But that the judges did then, as they would now, give an opinion upon a Question of Law, when properly put to them, Lord *Coke* produces an instance, in the Parliament begun *November* 7, 1st. *Henry* the VII. " on the first day of which it
" was resolved by all the Judges, as to all those that were at-
" tainted of treason, and returned Knights, Citizens, or Burges-
" ses of Parliament, that the attainders were to be reversed by
" the authority of Parliament before they could sit in the House
" of Commons, and that after the attainders were reversed,
" both the Lords and those of the House of Commons might take
" their places, for such as were attainted could not be lawful
" Judges so long as their attainders stood in force: And thereupon
" the attainders were resolved by Act of Parliament, and then
" they took their places in Parliament."

Parliament, like all other Courts, has its own laws and cuſtoms by which its power is conſtituted, and its proceedings regulated, and that what belongs to the juriſdiction of Parliament is not to be meddled with any where elſe, but there proceeded in according to parliamentary rules.

Our Author in ſome meaſure corrects himſelf, for, in p. 6, he ſays "it is by the Law of Parliament, and by this only, that the Houſe of Commons *regulate their proceedings*, with reſpect to the various ſubjects of the juriſdiction they exerciſe." In the former poſition it was "the only rule by which the *power of judicature of the Houſe of Commons* is directed." Theſe two things are very diſtinct, and would appear ſo more, if it had been ſaid, that by the Law of Parliament they regulate their *form* of proceedings, which is all that the words can naturally mean. But it was intended by this as well as the other mode of expreſſion, imperceptibly to inſinuate, that the Houſe of Commons has no other rule by which to judge or determine in any cauſe, but the Law of Parliaments: And that our Author takes care to make ſuch a rule as excellently ſuits his own purpoſe. For if he is dark and ambiguous in his *uſe* or application of the Law of Parliament, he is not more clear in the *definition* of it.

In p. 6, he ſays, "the Law of Parliament may be conſidered as compoſed of two branches, 1ſt. The rules, orders, cuſtoms, and courſe of the Houſe, with their expoſitions of, and deciſions upon the Law, with reſpect to matters within their juriſdiction." The ſecond branch compoſing the Law of Parliament conſiſts, (according to our Author) "of the Statute Law of the Realm, ſo far as the ſame regards the Houſe of Commons, or the juriſdiction thereof."

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That the *Rules*, *Orders*, *Cuſtoms*, and *Courſe* of the Houſe, are the Law and Cuſtom of Parliament, ſhall not be diſputed: But what makes their *expoſitions of*, and *deciſions upon the Law*, part of the Law of Parliament, I know not; unleſs it be our Author's own doctrine, that the Houſe, "as expoſitors of their own reſolutions, "and expoſitors of the common and ſtatute Law, "have a right to declare, who are, and who are "not eligible as Members of Parliament."

The deciſions of the Houſe in matters of elections, were ſo little a Law to themſelves, till an Act of Parliament made the *laſt determination* final, that the variation of them was a public reproach.

But our Author has a curious method of proving, that the deciſions of the Houſe of Commons are part of the Law of Parliament. "The cuſtoms," (ſays he) "courſe and common judicial proceed-"ings of a Court, are the Law of the Court, of "which the common Law takes notice, without "alledging or pleading any uſage or preſcription "to warrant them."

The form of judicial proceedings may be, in ſome ſenſe, the Law of a Court. But the deciſions or determinations of a Court are not the Law of the Court, ſo much as they may be ſaid to be the Law of the Land, if they are at all Law. And nobody, I believe, ever heard of notice being taken of a deciſion, as a Court takes notice of an Act of Parliament, which it is *pars judicis* to do. As to alledging or pleading an uſage or preſcription to warrant deciſions, or to warrant the cuſtoms and courſe of a Court, it is hardly intelligible.

To clinch the matter however, our Author, in the next paragraph, ſays, "that the courſe of any "particular Court is a Law, and that the deter-"minations of a Court make part of the Law of "the Land, has been held from the earlieſt times,

"ſo

"so far back even as the year Book of II. Edward." ——In the former citation the judicial proceedings of a Court were the Law of the Court. Here, the thing really intended conveniently creeps out of its ſhell of ambiguity, and we are told in plain terms, the determinations of a Court make part of the Law of the Land. The confuſion runs between the *Law of a Court*, and the *Law of the Land*; between *common judicial proceedings* which ſignify the form only of proceedings, and the *determinations of a Court*. The end of all which, is to make the deciſions of the Houſe of Commons the Law of Parliament, and conſequently the Law of the Land, becauſe the determinations of a Court, (ſays our Author) make part of the Law of the Land.

A *ſeries rerum judicatarum* in a limited ſenſe may be conſidered as Law, becauſe Courts are very cautious in departing from what is eſtabliſhed by long practice; the Law in its humanity judging it better, in ſome caſes, even to adhere to confirmed error, than to ſhake foundations upon which the people, truſting to the authority of deciſions, have built. But no lawyer ever aſſerted, that determinations of a Court *abſolutely*, and in the abſtract, were Law: And if a year Book older than King *Alfred* had ſaid ſo, it only ſpoke inadvertently. Very grey-hair'd determinations have yielded to principles, when they came to be farther examined and better underſtood. But of all determinations in the world, thoſe of the Houſe of Commons, in matters of election, in paſt times, had the leaſt claim to this priviledge, the fluctuation of which was a very taunt and a proverb, till an Act of Parliament interpoſed.

The poſition of our Author needed ſome confirmation, and he has given it in the following words.

"Thus

" Thus the Rules, Orders and Courſe of the " Houſe of Commons, with their expoſitions and " deciſions on matters cognizable before them, " are as much the Law of the Land, as the Rules " and Orders of the Court of King's Bench with " *their* determinations, are the Law of the Land. " Nay, ſuch proceedings and deciſions of the " Houſe of Commons, are in truth more binding " than thoſe of the Courts at *Weſtminſter*, becauſe " from the former there lies no appeal."

The determinations of the Court of King's Bench, or any other ſuch Court, are Law in the ſenſe which has been mentioned, and in that only. To their ſuperiority in point of uniformity and conſiſtency, we refer the compariſon between them and the determinations of the Houſe of Commons, before the Act of Parliament put a ſtop to their ſhameful variation. Though ſubject to no appeal to any other Court, they were conſtantly liable to, and affected by appeals from the Houſe at one time, and in one cauſe; to the Houſe at another time, and in another cauſe: An *appellate* juriſdiction, of all others the moſt dangerous, and found, in experience, to be the moſt deſtructive of the end of judicial determinations, which is to do juſtice, to quiet minds, and give ſtability to their rights and poſſeſſions.

With regard to our Author's ſecond branch of the Law of Parliament, it is a diviſion, that inſtead of *diſtinguiſhing*, does moſt effectually *confound* the things profeſſed to be ſeparated. I can hardly make ſenſe of the *Statute Law* being a branch of the Law of Parliament, in the ſenſe in which our Author uſes the laſt term, namely as in contradiſtinction to every other ſpecies of Law. But if he allows the Statute Law to be part of the Law of Parliament, ſo far as it *regards the Houſe of Commons, or the juriſdiction thereof*, it is difficult to conceive

conceive, how he can exclude the Common Law from being alſo a part of the Law of Parliament under the ſame limitation: For it cannot be denied that the Common Law is of equal force with an Act of Parliament. And it is a jeſt to ſay, the Common Law does not regard the Houſe of Commons, or the juriſdiction thereof, as much as ſome particular Statutes do. Our Author, however, had a very good reaſon, which will hereafter appear, for not including the Common Law in his definition of the Law of Parliament. The real truth is, neither the Statute Law nor the Common Law are, in any proper ſenſe, part of the *Lex & Conſuetudo Parliamenti*, though that may, properly enough, be ſaid to be part of the Common Law of the Land. But both the Statute Law and the Common Law are a Law *to* Parliament, as well as to inferior Courts, when they are the Law of the Subject upon which the juriſdiction of either Houſe of Parliament is exerciſed.

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Fifthly, to obſerve upon the general ſcope of our Author's argument, That we do not perceive the occaſion there was for the proofs he has brought to eſtabliſh the power of expulſion, and therefore paſs over the pages occupied therewith. Neither can we find that he has given any thing like an argument upon the more material head of *incapacity* or *diſability*, but two. The firſt is, that expulſion by neceſſary conſequence and *ex vi termini* includes incapacity, the illuſtration of which, fills from the top of the 9th page, to the bottom of the 12th, but proof or authority there is none offered. The ſecond is, what was before mentioned, that, "admitting expulſion does not create

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How far this is a proper method of vindicating the proceedings of the Houſe of Commons, it is for our Author to conſider. But it is clearly changing their ground, as they have laid the incapacity upon the expulſion. Perhaps our Author thought this foundation needed to be ſtrengthened.

In ſupport of the doctrine in the ſecond poſition, we are referred to nothing but this ſingle propoſition, " that the Houſe has the ſole and excluſive " right of determining all matters of, and incident " to elections and returns." To eſtabliſh which propoſition, a number of authorities and caſes are cited, which fill up from the top of page 13, to the bottom of page 30. But with theſe authorities and caſes we have very little to do, as we do not diſpute the propoſition itſelf. What we have to obſerve is, that our Author has placed the *eſſence* of the propoſition in the *excluſiveneſs* of the juriſdiction, whereas the moſt eſſential part of it is the object of the juriſdiction; namely the qualifications and diſqualifications of the Electors and Elected: And the point is, whether the right to judge of theſe reaches to, or includes a power to incapacitate or diſable; or what is meant by declaring who are, or are not eligible.

The authorities which prove the excluſive juriſdiction of the Houſe of Commons to judge of the qualifications of the *Electors*, conclude nothing to the power of incapacitating the *Elected*. Thus, at once, we get rid of all the caſes from p. 13, to p. 26. As to the qualifications of the Elected, it is ſaid (p. 26, med.) " the right of the Houſe to " decide with reſpect to them was not in any of " the caſes diſputed." But then it remains to be ſet-

tled, what is implied in *deciding upon the qualification and disqualification of the Elected.* And this must depend upon " the sense in which the words *qualification* and *disqualification* are taken.

If *qualification* and *disqualification* of the *Elected*, are quite synonymous terms with a *capacity* and *incapacity to be chosen*; and *deciding* upon the qualification and disqualification of the *Elected*, is a convertible term with *declaring*, or by declaration, *making* one *eligible*, or *not eligible*, then it may be enough to say, the House of Commons are admitted to have the sole right of deciding with regard to the qualifications of the *Elected.*

Such an exposition, or conversion of terms however, not being self evident, it is not unreasonable to demand some authorities; and without authorities, no one is at liberty, in argument, to use the *different* terms *indifferently*. Which compels me for a

Sixth observation, to put our Author in mind, that this is one instance more, in which he has egregiously trespassed in the article of confusion of terms; and that his argument must necessarily, from that very circumstance, be loose, deficient, and inconclusive.

It has already appeared in the different places which have been occasionally cited, that our Author's general proposition is this; " That the House of " Commons have the exclusive power of examin- " ing and determining the rights and qualifica- " tions of Electors and Elected."—page 13th. Which is formally stated, as convertible with the right of the House to *declare who are, and who are not eligible*; because in support of the latter, the former is undertaken in the same page 13, to be proved, and is the only proof of it.

Again, in page 26, It is the " *right of deciding* " *with respect to the qualifications of the Elected,*" which

which is ſaid not to have been diſputed. But inſtantly, in the very next page 27, we find the terms *Capacity* and *Incapacity* ſubſtituted in room of Qualification and Diſqualification, and uſed exactly as of the ſame import. Thus, ſays our Author, (page 27, at the top) "When the body "which expelled him is diſſolved, his *capacity* of "being elected revives.—The *incapacity* is not "perpetual." And but two lines lower, the term *diſqualify* is reſumed as equipollent.—"the "Houſe of themſelves can *diſqualify* any Member." —And again in the next paragraph, the term *diſqualify* is repeated, and applied with the ſame indiſcrimination, in theſe words.—"By their reſo"lutions only, perſons of various claſſes are *diſ*"*qualified.*"

It is nevertheleſs evident, that thoſe terms are of the utmoſt importance in the argument. They enter the very eſſence of the queſtion. Yet our Author confounds, changes, and alternately uſes them, without offering, or having to offer, one ſingle authority to warrant it. The reaſons will hereafter appear, why this promiſcuous application of the terms cannot be admitted of. At preſent we ſhall only ſay, that where terms are promiſcuouſly uſed, without ſettling or affixing their preciſe ſignification, it is impoſſible the argument can proceed with real force, or conclude to fair demonſtration. In farther confirmation whereof, we may obſerve,

Seventhly, That our Author alſo introduces *forfeiture*, as another equivalent term, mixed up in the jumble, with *diſqualification* and *incapacity*. He confounds a judgment or ſentence of the Houſe of Commons, applying or giving effect to a forfeiture incurred by law, as the ſame thing, and of the ſame import, with their *making* an *incapacity to be choſen* by their own *declaration* or *reſo-*

lution. Thus in page 27, after aſſerting, as before-mentioned, that "the Houſe of themſelves "can diſqualify any Member during that Parlia-"ment," he adds, as the reaſon or proof of that aſſertion, "That whatever ſort of a Right, the "right of being elected is, it may, like other "rights, be forfeited by crimes and miſdeme-"nours," and (ſays our Author) "Who ſhould "judge of thoſe cauſes of forfeiture, but the bo-"dy of which he is a member?"——As if *judging* of a *cauſe of forfeiture incurred by law*, was nothing different from *making* the *cauſe of forfeiture* without any other law, but the ſentence or reſolution which inflicts it; than which nothing can be more abſurd.

It ſeems therefore to be totally beſide the purpoſe, what our Author proceeds in the very next line to ſay, that "indeed the right of juriſdiction "in the Houſe of Commons, in this reſpect, is "ſo fully eſtabliſhed by immemorial uſage, that "it cannot be diſputed without controverting the "fundamental principles on which the law of the "land depends."——From this the only thing to be collected, is irreſiſtible evidence, that our Author means by the *right of judging of a cauſe of forfeiture*, the ſame thing with the *right of deciding with reſpect to the qualifications of the Elected*; which in the preceeding page 26, he informed us, "had "not been in any of the caſes diſputed." Accordingly upon that principle, and in confirmation or illuſtration of what he ſays in page 27, as above-cited, "that the right of juriſdiction in the Houſe" *of judging of cauſes of forfeiture*, "was ſo fully e-"ſtabliſhed by uſage," he proceeds to mention that "the Houſe, as appears from their journals, "have determined with reſpect to the *qualifica-"tions of the Elected*, from time to time, down "from the year 1553, to the preſent period:

"And

"And it is (he adds) by their reſolutions only, "that perſons of various claſſes are at this day "diſqualified." Which leads to this

Eighth obſervation, That whereas our Author's general poſition is, "that the Houſe of Commons "has the ſole right of deciding upon the qualifi-"cation and diſqualification of the Elected,"—upon which *alone* he reſts the proof of this other propoſition, "that the Houſe have a right to de-"clare who are, and who are not eligible as Mem-"bers of Parliament:" When he gives us a liſt as he here proceeds to do in page 27, and down to page 32, of the various claſſes of perſons, who by the reſolutions of the Houſe of Commons *only*, are at this day diſqualified; or, as he immediately expounds the term, are by *their reſolutions not eligible*, ſuch as clergymen, judges, &c. or when, as he expreſſes himſelf in page 29, he gives us "va-"rious other inſtances, in which, beſides theſe per-"manent diſqualifications, the Houſe have deter-"mined and adjudged with reſpect to the qualifi-"cations of the *Elected*, adjudging perſons not to "be eligible:" I ſay, when our Author does this, it will be neceſſary, in conſidering his liſt and inſtances, carefully to attend and diſtinguiſh to which particular *ſpecies* of non-eligibility, (which is a term that comprehends every thing) rank'd under the *genus* of *deciſions upon the diſqualifications of the Elected*, the inſtance produced refers and belongs. For, as our Author has, by a juggle of words, confounded under one generick deſcription of deciſions upon the diſqualifications of the *Elected*, every particular ſpecies of diſqualification, properly ſo called, and every ſpecies of incapacity, and alſo forfeiture, and that ſort of diſqualification, which I ſhould term diſability, and non-eligibility by mere declaration or reſolution of the Houſe of Commons: It is plain, that in an accurate diſcuſſion

cuſſion of this ſubject upon the preciſe and diſtinct terms, no inſtance or claſs of inſtances can have the leaſt pertinence to the real queſtion, but ſuch as ſpecifically belong to that ſort of diſqualification or non-eligibility, which ought to be termed diſability by the mere reſolution and declaration of the Houſe of Commons. It is evident that every inſtance of diſqualification, incapacity, forfeiture, diſability, or non-eligibility, ariſing from any cauſe *external* to the reſolution or declaration of the Houſe of Commons; or ſpringing out of any law or conſtitution antecedent to, and independent of ſuch reſolution, is totally foreign to the preſent diſpute.

Whether, or how far, the inſtances given by our Author in his liſt do, or do not belong to the one or the other of thoſe deſcriptions, will be examined hereafter. We are at preſent only ſpeaking of the general conſtruction, ſcope, and tendency of our Author's reaſoning; and it is ſufficient to have given this hint of the caution neceſſary to a juſt conſideration thereof. That we do it not without reaſon, will be ſtill more manifeſt, when we farther obſeve, in the

Ninth place, That nothing can be more vague, looſe, and confuſed, than our Author's expreſſions as to the declaration or deciſion of the Houſe of Commons, by which this incapacity is made, or, in his language, is declared; although upon this very thing, his whole argument hinges, and it's force entirely depends.

Our Author has given it no leſs than three or four different turns, and all of ſuch different import, as moſt materially to affect the queſtion. In page 10. §. penult. he ſays, "the Houſe may "declare who *by law* are not to be choſen;" ſecondly, at the bottom of page 12, he ſays, (leaving out the words *by law*) "the Houſe have a "right

" right to declare who are, and who are not eligi-
" ble, as Members of Parliament."——Thirdly, in page 27, at the top, it is ſaid, " the Houſe of " themſelves can diſqualify any Member;" 'tis indeed added, " during that parliament,"——but the length of time is not of the eſſence of the queſtion. Here too, alſo, may be obſerved, fourthly, what is ſaid page 30, §. penult. That this Houſe " have exerciſed the right of adjudg-
" ing and declaring the incapacity of being e-
" lected, not only as expoſitors of the written, or " ſtatute law, but even *where the law has been ſi-
" lent*, they have adjudged perſons incapable of " being elected from the particular *circumſtances* " *of the caſe*, and upon general principles of *con-
" ſtitutional policy*."——And laſtly, what is men-tioned, page 27, That " it is by the reſolutions " of the Houſe *only*, that perſons of various claſ-
" ſes, are this day diſqualified."

The judicious reader will carefully ponder theſe various modifications of this declaration of diſqua-lification, the Houſe of themſelves can make; for the ſeveral ſhades differ exceedingly, and the va-riety of expreſſion is not a little perplexing, in an argument which requires the niceſt preciſion, and the force whereof, depends entirely on the terms of the queſtion. Light and darkneſs do not more diſagree, than thoſe different kinds of declaration, or adjudication, which our Author has heaped together. Nor can latitude or indiſtinctneſs of expreſſion, be more induſtriouſly uſed to darken and confound a ſerious and intereſting diſquiſi-tion. As a

Tenth obſervation, I cannot help taking notice of one particular part of our Author's reaſoning, though very unwilling to lengthen out this part of the work with trifles below obſervation. Page 27, at the top, our Author is pleaſed to expreſs him-

ſelf

ſelf thus: "None can ſay that, in the preſent in-
"ſtance, the right of being elected is taken away;
"for in truth it is only *ſuſpended*, during the ex-
"iſtence of this Parliament." Now this is clearly making the term or endurance of the diſability the ſole foundation of the power from which it is derived; which is an origin of juriſdiction, I am not acquainted with, and muſt, I think, be ſingular in the Houſe of Commons. In other courts, it is the juriſdiction which warrants the act, and not the act which founds the juriſdiction.

But, waving this, it appears to me that our Author is rather too ludicrous here for the ſubject he is upon. He ſtrangles the conſtitution, only it is with a ſilken cord; as if the ſound of the word *ſuſpend* could diminiſh the effect of a real deprivation, or ſweetning the potion deaden the poiſon. With the ſame breath that our Author tells us the right is only ſuſpended, he gives the act its true denomination, when he ſays in the next line, "the "*capacity* will revive—and the *incapacity* is but "temporary"—adding at the ſame time the harſheſt of all names, when he calls it a "forfeiture." I know not what comfort it would be to a perſon unfortunate enough to be ſhut up in a dungeon, to tell him his liberty was not taken away, but only ſuſpended, becauſe he was adjudged to be impriſoned for no more than ſeven years; or to alleviate the loſs of an eſtate, by informing the ſufferer the enjoyment of it was only ſuſpended, becauſe it was forfeited no longer than during the exiſtence of ſeveral generations. It is not in words to alter the nature of things. The right in queſtion is taken away *effectually*, though not *for ever*. And if to make the incapacity perpetual, is, what our Author ſays in the better opinion *perhaps* (for he is very cautious in his expreſſion) an Act of Parliament,

ment only is ſufficient, it may merit the enquiry we ſhall hereafter beſtow upon it, how any thing but an Act of Parliament, or ſome other Law of equal force, can take it away for any ſpace of time; ſince as the logicians ſay, *majus aut minus non variant ſpecies.*

I am glad to conclude this firſt and moſt diſagreeable part, by only farther taking notice in the laſt place, that our Author has, I think, unſucceſsfully endeavoured to avail himſelf of an inaccuracy at beſt, which he imputes to the advocates on the other ſide of the queſtion, when he tells us, p. 26, "they contend that the right of being "elected is a *common Law* right, of which no man "can be deprived but by Act of Parliament." Who is alluded to I know not. The right in queſtion is derived from the *conſtitution*, in which the people of England have an inheritance, as they have in the ordinary courſe of juſtice, which the Commons of England have called the Common Birth Right of the Subject. An Act of Parliament itſelf to take away the Common Birth Right of the Subject, would be an Act to take away Parliament and the Conſtitution wholeſale. But common right may be limited or taken away by operation of law and change of circumſtances in the perſon of any individual.

Our Author's anſwer to what he ſays is contended for, is but a poor one. He ſays, "in the firſt "place, it is aſſuming a propoſition for granted, "which may ſafely be denied, becauſe the right, "as was ſaid in the caſes here cited, is a *Parlia-* "*mentary* right, to be exerciſed only in Parlia- "ment, and therefore cognizable there only, "where the duty is to be executed."—That is but jargon. The right of being elected is a *common law* right in its origin and foundation, and a *Parliamentary* right in the uſe and exerciſe of the ca-

conceive, how he can exclude the Common Law, from being alſo a part of the Law of Parliament, under the ſame limitation: For it cannot be denied that the Common Law is of equal force with an Act of Parliament. And it is a jeſt to ſay, the Common Law does not regard the Houſe of Commons, or the juriſdiction thereof, as much as ſome particular Statutes do. Our Author, however, had a very good reaſon, which will hereafter appear, for not including the Common Law in his definition of the Law of Parliament. The real truth is, neither the Statute Law nor the Common Law are, in any proper ſenſe, part of the *Lex & Conſuetudo Parliamenti*, though that may, properly enough, be ſaid to be part of the Common Law of the Land. But both the Statute Law and the Common Law are a Law *to* Parliament, as well as to inferior Courts, when they are the Law of the Subject upon which the juriſdiction of either Houſe of Parliament is exerciſed.

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" incapacity, the Houſe of Commons have a right " to declare who are, and who are not, eligible as " Members of Parliament," which is the doctrine laid down at the bottom of page 12.

How far this is a proper method of vindicating the proceedings of the Houſe of Commons, it is for our Author to conſider. But it is clearly changing their ground, as they have laid the incapacity upon the expulſion. Perhaps our Author thought this foundation needed to be ſtrengthened.

In ſupport of the doctrine in the ſecond poſition, we are referred to nothing but this ſingle propoſition, " that the Houſe has the ſole and excluſive " right of determining all matters of, and incident " to elections and returns." To eſtabliſh which propoſition, a number of authorities and caſes are cited, which fill up from the top of page 13, to the bottom of page 30. But with theſe authorities and caſes we have very little to do, as we do not diſpute the propoſition itſelf. What we have to obſerve is, that our Author has placed the *eſſence* of the propoſition in the *excluſiveneſs* of the juriſdiction, whereas the moſt eſſential part of it is the object of the juriſdiction; namely the qualifications and diſqualifications of the Electors and Elected: And the point is, whether the right to judge of theſe reaches to, or includes a power to incapacitate or diſable; or what is meant by declaring who are, or are not eligible.

The authorities which prove the excluſive juriſdiction of the Houſe of Commons to judge of the qualifications of the *Electors*, conclude nothing to the power of incapacitating the *Elected*. Thus, at once, we get rid of all the caſes from p. 13, to p. 26. As to the qualifications of the Elected, it is ſaid (p. 26, med.) " the right of the Houſe to " decide with reſpect to them was not in any of " the caſes diſputed." But then it remains to be ſet-

 tled,

by the Houſe of Commons in this matter: And what is to be underſtood by the qualifications of Electors and Elected, or is fairly and legally implied in the power of examining and determining them, will be hereafter more fully conſidered, and has already been, in ſome degree, ſpoken to in the general obſervations premiſed.

Fifthly, We do not apprehend it to be any part of the preſent queſtion, whether Mr. Wilkes was juſtly or unjuſtly, or for what offence he was expelled in the late Seſſion of Parliament; Or, whether

mons. The Commons however were not ſatisfied with ſuch a Bill, for which they had their own reaſons. And afterwards, when the Lords ſent down to the Commons a Bill they had paſſed for the baniſhment of the Earl, it was again offered, to appeaſe the wrath of the Commons, that Lord Danby ſhould be degraded from his peerage, as well as baniſhed: but the Commons rejected the Bill, and not liſtening to the offer, ordered in a Bill of attainder, the Earl having by that time withdrawn himſelf. This caſe therefore may ſeem to prove rather the greater property, if not the neceſſity, of an Act of Parliament, inſtead of a judicial ſentence of the Houſe of Lords, for depriving a peer of a ſeat in the Houſe. But it would alſo ſeem to prove the ſame as to the other pains and penalties propoſed to be inflicted on the Earl of Danby: Which runs quite counter to the ſentence of the Houſe of Lords againſt Lord Bacon, the legality of which is hardly to be given up; eſpecially conſidering that the Lords have pronounced the like ſentences upon Commoners; particularly in the caſe of Sir Giles Monpeſſon, whom the Houſe of Commons expelled, and referred to the Lords for farther puniſhment upon their complaint. In the lateſt caſe of the kind that has occurred, the Houſe of Peers upon the trial of a noble Earl, who held the ſame high office with Lord Bacon, for offences ſomewhat of the ſame complexion, did not chooſe to follow the example of Lord Bacon's ſentence as to excluſion or incapacity. For which, no doubt, the Houſe had its particular reaſons; but they might be, and, from the circumſtances, probably were ſuch as bore no relation to any queſtion as to the power exerciſed in Lord Bacon's caſe. The judgment therefore in that laſt caſe, is no authority either way: And the point muſt remain in its preſent ſtate of uncertainty till farther cleared up: Which for the honour of the peerage, it is to be hoped, there never may be an occaſion for.

If,

whether for ſuch offences as Mr. Wilkes has been convicted of, and now is in execution for, infamous puniſhments might, or as our Author ſays, frequently have been inflicted. Nor whether ſuffering an infamous puniſhment, inflicted in a courſe of law, does infer an incapacity to be elected a Member of Parliament. For, on the one hand, Mr. Wilkes was *de facto* expelled, and on the other, he has not, *in fact*, ſuffered, or been condemned to any puniſhment underſtood by the law of this country to infer infamy. By the bye, I imagine it is the cauſe of, and not the puniſhment itſelf, which infers the infamy.

Sixthly,

If, having one clear Example, we might preſume to venture an opinion, I muſt confeſs, I think the juriſdiction of the Houſe of Lords implies ſo much of the higheſt power that the rule, *majus includit minus*, muſt have place. Nor can I ſee any good reaſon why the Houſe of Peers ſhould not have this power over their own body. There ſeems on the contrary to be cogent motives of public juſtice, why they ſhould have it for this moſt eſſential purpoſe, of preſerving the fountain of judgment, in which the ſtate, and all the ſubjects of the kingdom are deeply intereſted, pure and untainted. At the ſame time it may not be ſo clear that the argument, as to the right or power, would proceed from the Houſe of Lords to the Houſe of Commons: Becauſe, in whatever ſenſe the Houſe of Commons may be called or conſidered to be a *Court*, they differ widely in this reſpect from the Houſe of Lords; which in the higheſt notion of the term, is the univerſal, ſovereign, and ſupreme judicature of the nation, whoſe juriſdiction is not confined to its own members, or founded in the particular relation to their body, but extends over all orders of ſubjects, and acts in the regular courſe of *legal Trial*. On the other hand, the congenialneſs of the powers of the two Houſes over their own Members, merely as a *parliamentary* juriſdiction, and the intereſt which the conſtituents have in their own repreſentation, that it be pure as well as perfect and complete, might be thought (if we were reduced to reaſon upon principles) to argue for the power of expulſion in the Commons, as an original inherent right. But, as things ſtand, it muſt, I think, appear that the power of the Houſe of Commons, in regard to expulſion, is too firmly fixed, by uſage and exerciſe, now to need any other ſupport, or to be liable to be ſhaken: At leaſt it is ſo, if there can be, as doubtleſs there can, a juriſdiction acquired by uſage and preſcription.

Sixthly, It does not appear to us in the leaſt to concern the merits of the real queſtion in debate, how and in what manner, whether with unanimity or diviſion, the vote of the Houſe of Commons paſſed, reſolving or adjudging Mr. Wilkes to be incapable of being elected a Member to ſerve in this preſent Parliament; which is flung out by the writer of the *Serious Conſiderations*, as a kind of *argumentum ad hominem*. Of the ſame inſignificancy is it alſo, that, *ſuppoſing* Mr. Wilkes to have been actually under a legal incapacity or diſability to be choſen, when he was re-elected after the expulſion; ſuch re-election might, on that ſuppoſition, have legally been adjudged to be void: And upon his being a ſecond time re-choſen, when another candidate appeared upon the poll, the votes given to the perſon ſuppoſed to be diſabled, might be conſidered as thrown away, and the candidate having the minority of votes, adjudged to be duly elected.

All we have to ſay on either of theſe points, is, that a vote of the Houſe of Commons, however paſſed, is the act of the Houſe, in legal conſtruction. And if the Houſe itſelf was thereby concluded as to conſequences, ſtill more were thoſe who concurred in the vote adjudging Mr. Wilkes to be *incapable*, crippled as to the after proceedings, upon the ſubſequent elections of the county of Middleſex, as, upon *that* vote, what followed eſſentially and ſolely depended *. But ſuppoſing any

* It muſt, however, appear ſomewhat odd, that when, under thoſe circumſtances, and for thoſe reaſons, it was determined, that the candidate who had the minority of votes, was duly elected, and ought to have been returned, becauſe of the incapacity of the other, duly notified by the very writ of election, iſſued by order, and in terms preſcribed for the purpoſe by the Houſe,—the returning officer ſhould not only not have been cenſured for making a falſe return, aggravated with an immediate and moſt manifeſt

any good objection to lie againſt the adjudication of incapacity, made by ſuch a vote, the dilemma into which the Houſe was thereby brought, can have no real influence upon the adjudication itſelf; for that muſt ſtand or fall upon it's own merits.

Seventhly, It is nothing leſs than deciſive of the preſent queſtion, that, in fact, the Houſe of Commons have, by reſolutions of theirs, declared particular perſons, or various claſſes of men, not eligible as Members of Parliament. For ſuch a queſtion may ariſe in determining the merits of an election; and the Houſe, in exerciſing it's legal judicature upon an election, may have determined a perſon, or claſs of perſons, not to be eligible, ſtrictly *according to the known and ſubſiſting law of the land*: Which is the true criterion by which to judge of all ſuch determinations, when cited as authoritiesand precedents in the queſtion now debating. And farther, if there have been determinations in this reſpect not *according to the law*, or contrary to the conſtitution; it will not follow that ſuch determinations have, of themſelves, made or altered the law or conſtitution, ſo as to authorize repetitions of the like.

Laſtly, The fair diſcuſſion of the preſent queſtion is *not* to be embarraſſed with this conſequence, that ſuppoſing the Houſe of Commons to do wrong, and to involve themſelves in a dilem-

manifeſt contempt of the Houſe itſelf; but that it ſhould have been allowed, as it cannot be denied it was, by ſome of the veryneſt ſticklers for altering the return, that the returning officer had acted according to his duty and his oath. *That* to a plain underſtanding would ſeem to be tantamount to allowing that he acted according to Law; the conſequence of which would be, that the Law is at war with the *Incapacity* adjudged by the Houſe of Commons.

ma, or to reject any expedient within their own power, for extricating themſelves out of ſuch a dilemma, there is not in any of thoſe caſes any remedy; becauſe the matter not being cognizable any where elſe, the determination of the Houſe takes effect by its own force, and is ſubject to no appeal or review. For ſuppoſing all that to be true, the ſubſtantial merits of the caſe do not vary; the conſtitution, tho' infringed, is not, *ipſo facto*, overturned. But in reality, the conſtitution does know the remedy, for an improper unconſtitutional exerciſe or exceſs of a legal conſtitutional power, or for an illegal aſſumption of a power, unknown to the conſtitution, or deſtructive of it, if ſuch inſtances do ariſe, *vindice digni*, were it otherwiſe the conſtitution would not be the *finiſhed* thing it is, or ſo well deſerve, as it really does, the character beſtowed upon the Law of England, of being *the perfection of human reaſon*.

Having thus ſtated what the Queſtion is *not*, and endeavoured to deliver it from what might darken or divert from it; let us now try to ſet up a true guide-poſt; when in the

Third place, we ſtate what the real queſtion *is*: And for preventing all ambiguity explain the terms neceſſary to be underſtood for exactly comprehending it. And

The ſhort and comprehenſive ſtate of the Queſtion ſeems to be no other than this——Was or was not Mr. Wilkes, he having been in that Seſſion of Parliament expelled the Houſe, incapable of being elected a Member to ſerve in this preſent Parliament? The words of the Reſolution are, "That Mr. Wilkes *was*, and *is* incapable," And the reſolution is, by the order following hard at it's heels for a new Writ, thus paraphraſed, "That

"Mr.

" Mr. Wilkes was *adjudged incapable of being elect-*
" *ed a Member to ſerve in this Parliament.*"

But as our Author has choſen to confound *incapacity* with *diſqualification*, forfeiture and ineligibility, I incline, before going farther, to fix our terms as clearly as I can.

An *incapacity* of being elected, in a latitude of ſignification, or in common parlance, may comprehend whatever hinders or obſtructs one from being legally, or with effect, choſen. But to ſpeak with preciſion, we ought to diſtinguiſh between *want of capacity*, and *incapacity*, properly ſo called, juſt as we do between *never having had* a thing, and it's being taken from us. Or in other words, I ſhould ſay, there are incapacities of *defect*, and incapacities by privation.——Incapacities *defective*, and Incapacities *privative*.

Thus, as there are *natural*, ſo there are civil capacities, of which that of being elected a member of Parliament, is one: And we ſhall beſt underſtand what it is by inſtances of the defect, or want of it. The capacity is either ſtrictly *radical*, and *original*, or *adventitious* and *ſuperinduced*. For example; a woman wants the original radical capacity of being elected a Member of Parliament; being incapable by ſex, of every State Office I know of, except being Sovereign or Regent of the realm. A Peer, or Lord of Parliament, is by his civil capacity, utterly, and in the nature of the thing, incapable of being elected a Member in the Houſe of Commons; the one term being abſolutely excluſive of the other. An infant on the breaſt, or an ideot, I preſume, are by nature incapable of being elected; becauſe it is morally, or indeed rather naturally, impoſſible they can be Members of Parliament. So in 23 Eliz. a lunatic having been returned a Burgeſs for Hull, another was choſen on a ſecond writ, and the firſt having

claimed his place, or it having been claimed for him, the Commons examined the cauſe, and finding the return of lunacy to be true, they refuſed him. Theſe are all original and radical incapacities by defect, or for want of that *ſtate* upon which, alone, every other quality or ingredient neceſſary, to a perfect capacity muſt operate, and to which it muſt adhere, as the natural ground work and foundation. So we ſay, one is deſtitute of the capacity, or he has not a capacity in him.

Poſitive Law has ſuperinduced certain qualifications, which, by conſtitution, are as eſſential to the capacity of being elected, with effect, as the original capacity itſelf. The Proteſtant religion is one. A Popiſh recuſant is incapable of being choſen. One cannot be put up as a candidate, who, if preſent, refuſes to ſwear to the neceſſary qualification in land; which in ordinary ſpeech is diſtinguiſhed by the appropriated name of *Qualification*. The oaths to government create another adventitious qualification: And we ſay, the perſon *qualifies* himſelf by taking the oaths. But this goes more properly to the capacity of *ſitting*, than of being elected: as the oaths are not neceſſary to be taken before election. However, if refuſed in the Houſe, the Seat is void as if no return had been made. So a Quaker having been returned a Member, he was called in to the table, and declining, upon being aſked, to take the oaths, though he offered to affirm in terms thereof, he removed, and the ſeat was declared void. Perſons alſo having ſat without taking the requiſite oaths, have been held to be incapable of being Members, as if they had not been returned, and conſidered as objects of puniſhment, as if they had come into the Houſe without being choſen. It was ſo adjudged in the caſe of Sir John Leeds.

An

An incapacity by privation is nothing elſe, as the term itſelf plainly enough intimates, than a perſon's being deprived of the capacity which he had radically or inherently, and that was rendered perfect by every other ſuper-added requiſite qualification. So we ſay, One is *incapacitated* as by a ſtroke of force, or act of power, whether by himſelf, or by a power external to him: And this ſuppoſes the perſon before to have *had* the capacity, as one being ſtripped or diveſted of any thing, implies the anterior poſſeſſion of it.

This ſort of incapacity is alſo very properly termed a *diſability*; becauſe the perſon is diſabled, *i. e.* he is deprived of his natural and former capacity, or right to be elected: Which can only be done by ſome act *of* or *upon* the perſon who had the capacity, or upon the capacity itſelf, or upon the original and radical ſtate and title, or the ſuper-added qualifications which conſtituted the antecedent capacity.

The privation may be abſolute and radical, going to the very foundation, being, and exiſtence of the original incapacity, in the nature of a perfect *annihilation* or extinction: As when a Commoner is created a Peer, or a perſon becomes civilly dead by an attainder. Or the privation may be *ſub modo* qualified and limitted; as when it does not affect the original radical capacity, but only touches ſome of the extrinſick or adventitious qualifications. For if the privation reaches the original radical ſtate and title, which is moſt of the eſſence of the capacity, it is, in it's nature an annihilation or extinction, whether it does or may operate for ever, or eventually only for a limitted time; in which laſt caſe, the revival is a reſurrection, or new beginning of exiſtence. Therefore it was, that in one of the general obſervations, we objected to our Author's cobweb diſtinction,

when

when he ſays, the Right of Election is not taken away, but ſuſpended, becauſe the incapacity is not perpetual, but only temporary, being limitted to the exiſtence of the ſubſiſting Parliament. An attainder itſelf may operate but a temporary privation. A ſuſpenſion more properly refers to the ceaſing of the adventitious qualifications, which may riſe and fall by accident.

Nothing more is neceſſary at preſent for applying the diſtinctions we have made, but to mention that the incapacity Mr. Wilkes is ſuppoſed to be under, is an incapacity by privation inflicted either mediately or immediately, or in both ways, by the act of the Houſe of Commons.

The general queſtion, as ſtated before, does therefore, if we follow the Author of the *Caſe*, divide itſelf into theſe two ſubordinate branches.

Firſt, Whether Mr. Wilkes was incapacitated by the expulſion; which ſeems to be the ſenſe of the adjudication of the Houſe of Commons.

Secondly, Whether admitting (as our Author ſpeaks) that expulſion "does not create an incapacity of being re-elected;" yet Mr. Wilkes was *incapacitated* by the poſterior reſolution of the Houſe, by virtue of the power aſcribed to the Houſe, as expoſitors of the law of the land, to declare who are, and who are not eligible as Members of Parliament: Or (as the Author elſewhere expreſſes himſelf) to *diſqualify* by their own reſolution.

We proceed therefore, in the

Fourth place, to lay down what we apprehend to be the principles and grounds upon which the queſtion as above ſtated, explained and divided, ought to be tried. And

Firſt, The queſtion ſo far as it depends upon the virtue or effect of the expulſion only, which

is

is the firſt branch of the ſub-diviſion, muſt, I think, be tried on one or other of theſe grounds.

1ſt. The natural and neceſſary import of the term Expulſion; including, as our Author ſays, by neceſſary conſequence, or *ex vi termini*, ſuch an incapacity as is contended for: To which our Author confines the whole of what he ſays upon the point. Or,

2dly. The acquired or adopted ſignification, if there any is, of the term Expulſion; fixed by ſuch a conſtant practical uſe of the word, in the Houſe of Commons, which is the only competent authority, as is ſufficient, by conſtruction or expreſs declaration, to expound the term Expulſion, as neceſſarily including or referring incapacity: To which muſt be referred the precedents, and authorities, alledged to be of that import by expreſs determinations.

3dly. The conſtitution of the Houſe of Commons, and the nature and extent of the authority and power by which the Houſe inflicts the puniſhment of expulſion: By which we ſhall ſee, (if it can thence be ſhewn) either that the power and authority is not of that ſort or ſtrength, that ſuch an effect as incapacity is within its reach: Or, on the other hand, it may appear, that the power and authority is ſuch, that expulſion not only may, but muſt carry that conſequence with it, as neceſſarily, as a cauſe produces it's effect; unleſs we admit an unnatural maiming of the expulſive power, or alledge an actual reſtraint and limitation in the act of expulſion, on purpoſe to diminiſh it's effect.

Or laſtly, the end and deſign, the uſe and purpoſe of Expulſion, from which it will appear, if it can be made appear, that expulſion does not anſwer it's manifeſt end, unleſs it includes incapacity: And conſequently, the neceſſity of it's implying

plying ſuch an effect, will be demonſtrated; or it will be ſhewn on the other hand, that it would be as uſeleſs, as unfit and improper that it ſhould go ſo far.

Again, conſidering the queſtion as in it's ſecond branch, upon our Author's doctrine, that the reſolution of the Houſe of Commons, adjudging a perſon incapable, is ſufficient of itſelf to diſable or diſqualify any man from being a Member of Parliament: This muſt infallibly be tried upon the following grounds and principles.

Firſt, The character or capacity in which the Houſe of Commons act, when they do and only can make reſolutions or adjudications with regard to incapacity: And the nature of the power competent to them in that character.

Secondly, The ſubject matter upon which the power competent to the Houſe in that character and capacity, operates or is exerciſed: And the bounds within which it is, in this reſpect, legally circumſcribed.

Thirdly, The law that governs, and ought to govern the Houſe in the exerciſe of the power belonging to that capacity in which they then act: Which will involve the conſideration of the law of Parliament; what it is, and how far that alone, or any other ſpecies of law, is the rule of their proceeding in ſuch caſes. And,

Fourthly, Which is properly a branch of the laſt; but I chooſe to mention it by itſelf, becauſe of the importance it will be thought to be of. The precedents of general reſolutions and determinations of the Houſe of Commons, which have been cited as ſufficient to eſtabliſh a power or authority in the Houſe, by their own reſolution ſingly, to adjudge perſons to be ineligible, or to diſqualify them to ſerve as Members of Parliament.

The

The method we propoſed brings us now in the

Fifth place, to examine the queſtion in both its branches upon the foregoing grounds and principles, upon which only, as we have preſumed to ſay, it can be fairly tried. And

1ſt. Does expulſion, *ipſo jure*, create an incapacity of being re-elected in the ſame Parliament?

Let us, with our Author, try it firſt upon the meaning of the word expulſion. Here it may be obſerved, that our Author is miſtaken, when he ſays the word expelled has for more than a century been conſtantly uſed. The inſtances quoted by the writer of the *Conſiderations* prove the miſtake. And as ſince the Revolution, about the time of which the term *expell* began to be regularly uſed, expulſions have been leſs frequent than before, and very rare ſince the Acceſſion; it is not to be much wondered, if there has not been, in that latter period, much diſcuſſion on that ſubject, ſo as to have made a ſettled ſtandard for the ſignification of the word, by the authority of caſes in Parliament.

Another obſervation to be premiſed is, that though our Author has given us a variety of ſynonymous expreſſions uſed in older times, ſuch as, *ſevered*, *cut off*, *removed*, *diſcharged*, *put out*; he has overlooked others full as frequently made uſe of, *viz.* *diſabled*, *incapable*, *unworthy*, and *unfit* to be a Member, or of the like import. Our Author had a reaſon for omitting theſe phraſes: And the reaſon will hereafter appear. I only mention this now, becauſe the writer of the *Conſiderations* has endeavoured to raiſe a particular argument upon the word *diſable*, uſed in antient expulſions; infuſing into it an emphatical ſignification, which, I ſhall preſently ſhow, the inaccuracy of old faſhioned clerks and journal-writers, knew nothing of,

when they and the Parliament Men of thoſe times uſed the word.

The poſition aſſerted by the Author of the *Caſe*, is, that " however various the cauſes of expulſi-" on may have been, the effect of it is conſtantly " the ſame. For the neceſſary conſequence of " expulſion, (he ſays,) is, that the Perſon expel-" led, ſhall be incapable of being elected again " to ſerve in the ſame Houſe of Commons that " expelled him. This incapacity is implied in " the very meaning of the word itſelf."

His argument or proof is no other than this: " Should (ſays he,) any man of plain ſenſe, nay " ſhould any young academician, or ſchool-boy " even, be aſked what was underſtood by expel-" ling a man from any ſociety, they would cer-" tainly anſwer, the meaning is, that he ſhall ne-" ver be a member of that club, or of that col-" lege, or of that ſchool, any more."

This is literally a childiſh argument, and a ſchool-boy is too good to anſwer it. Would not any child almoſt wonder, if upon being put out of a room by his parent for miſbehaviour, it was told by another perſon that it could never be ſuf-fered to go into the ſame room again, as long as its parent lived? Is any ſchool-boy ſo ignorant as not to know, that though a ſcholar expelled can-not belong to the ſchool till he is again admitted, yet he *may* be reſtored? Or was one never re-ad-mitted into a club, a college, or a ſchool, from which he had been expelled?

A Member of Parliament *expelled*, is cut off and ſevered from the Parliament. His relation to it is diſſolved. But why may it not revive in the ſame way it was created at firſt? The maſter of a ſchool, governors of a college, or a club, have the power of admiſſion, and thereby of conſtituting the relation of the members. The Houſe of Commons

Commons have *not* the power of creating a Member. *That* the Electors only have; and by their election the relation is created at firſt, or revived after it has ceaſed or been diſſolved.

But ſays our Author, "expulſion clearly, *ex vi* "*termini*, ſignifies a total, and not a partial ex- "cluſion from the Society, or Parliament, from "whence he is removed."—Moſt certainly. The expulſion diſſolves the relation as much as if it never had exiſted. But it is not like the diſſolution of marriage, by death or divorce: For the relation may be reſtored in the regular way of conſtituting it, whatever that is.

It is true what our Author adds, That "when "a Member is expelled, he is not excluded from "the meeting of that day, or of that ſeſſion, but "from that Parliament; that is, from that body "of which he is a Member." And he cannot be excluded from any Parliament, but *that* of which he is a Member, becauſe from no other can he be expelled, having a relation to none elſe. But he may again become a Member, and return to have the ſame relation: For one turn'd out upon a void Election, or a falſe return, inſtantly ceaſes to be a Member as much as if he never had been returned, being ſubſtantially, though not by the ſame form of expreſſion, ejected: Yet he may be re-choſen and will then be a Member as before.

It is not therefore the being put out or excluded, which is the real *vis termini* of expulſion, that hinders one from being brought back again and entering a freſh by the ſame door at which he came out. The natural meaning of the word is too weak a bar for ever to ſhut it againſt him.

The next enquiry therefore is,

Secondly, If there be an acquired or adopted ſignification of the term expulſion, fixed by a con-

ſtant practical uſe of the word in the Houſe of Commons, or any expreſs precedents by judgments of the Houſe, of ſufficient authority to aſcertain that in the ſenſe and uſage of Parliament, expulſion neceſſarily includes and infers incapacity.

The Author of the *Caſe* has left this upon the negative evidence of the fact, "of there never "having been any attempt made to re-elect one "in the ſame Parliament, out of the very many "who have been expelled, except in the ſingle "inſtance of Robert Walpole, Eſq; when the "Houſe declared the effect of their vote of ex-"pulſion"—and, (ſays our Author,) "there can-"not be a ſtronger inſtance, that, in the general "ſenſe of mankind, ſuch incapacity is the neceſ-"ſary effect of expulſion."

But ſuppoſing the fact ſtood preciſely as ſtated by our Author, which it does not, as will hereafter appear; And ſuppoſing that Sir Robert Walpole's caſe had alſo been a *ſilent* one, added to the negative number, the propoſition is by no means proved by ſuch ſort of evidence. For till the queſtion occurs, which it can only do upon a re-election, it cannot be tried; and until it is tried and determined, it remains at beſt a moot point. The negative evidence ariſing from no re-election, after expulſion, does not prove that incapacity was the cauſe of there not being a re-election, no more that fifty decrees not appealed from, will prove that an appeal does not lie from the court which pronounced them. Nay, it does not prove that the expulſion was the reaſon of the perſon's not being re-elected; becauſe elections depend ſo entirely upon the will of the Electors, and the means and motives thereof are ſo various, that any election proves nothing but the predilection of the Electors in favour of the Perſon actually choſen. If a perſon whoſe ſeat

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is vacated by accepting of an office which does not diſqualify him, is not re-elected, it does not prove that it was becauſe of his accepting the place, and not on account of his own inclination to retire, that another is choſen in his ſtead.

But granting it were certain that the expulſion was the cauſe why the Electors did not again chooſe the perſon expelled, it could only prove that the Electors agreed in opinion with the Houſe of Commons, that he was not fit to ſit in Parliament. And it might nevertheleſs be true, that if they had differed in opinion with the Houſe upon that point, they would again have elected their old Member, notwithſtanding the expulſion. For Electors may ſo far diſagree with the Houſe, as even to think the very cauſe of expulſion a meritorious ground for re-electing the perſon expelled.

On the other hand one ſingle inſtance of a re-election after expulſion, is better proof that it has not been the general ſenſe of mankind that incapacity is the neceſſary effect of expulſion, than an hundred inſtances of perſons expelled and not re-elected, are that it is. For ſuch a ſingle inſtance neceſſarily brings the queſtion into judgment, being an expreſs declaration of the ſenſe of the electors, and their appeal to the Houſe itſelf for a deciſion. If therefore it can be ſhown that a Perſon re-elected after expulſion did ſit, it is inconteſtible evidence, and of deciſive authority, that it was not the ſenſe of Parliament, that expulſion created an incapacity. It is a poſitive proof of the negative, and the only one the nature of the thing admits of.

Now upon this head ſeveral inſtances have been referred to of perſons expelled, and re-elected, and ſitting in the ſame Parliament.

Sir

Sir Robert Sayer, expelled 20th Jan. 1689, has been mentioned as one that was re-elected. But as it appears the Parliament was immediately diſſolved, ſo that no queſtion would be tried upon his re-election, this caſe does not come up to a full authority. It is no proof however, as has been ſaid, that he was not re-elected, that the return is not found in the Crown-Office, where more of the old returns are miſſing almoſt than are extant.

But the anſwer that has been made in the *Conſiderations*, p. 25, to the caſes of Mr. Holborne, and Sir William Pennyman, who were both expelled on the 11th Auguſt 1642, by no means takes off the force of thoſe caſes. It is admitted that both the names appear again upon the Journals in the *ſame* Parliament, one in 1643, the other in 1645. But, ſays the writer of the *Conſiderations*, "though the names are the ſame, it is "far from being clear, that theſe latter were the "ſame gentlemen that were expelled in 1642; "and as a proof of this (ſays he,) it appears from "the Journal of the 11th Auguſt, that they were "not only expelled, but at the ſame time decla- "red diſabled to ſit any longer as Members during "that Parliament."

This will not do. No better proof can, in the nature of the thing, be produced, of an identity of perſons at ſuch a diſtance of time, than the ſame names appearing recently in the ſame place, and in the ſame ſtation. And ſuch a bare poſſibility as that, of two inſtances, of two names, applying to two different perſons, under ſuch circumſtances, amounts almoſt to an abſolute impoſſibility.

As to the argument from thoſe gentlemen being, by the act of expulſion, diſabled to ſit any longer as Members during that Parliament, it only

ly makes the caſes the ſtronger in point; becauſe their ſitting in ſpite of ſuch a declaration of diſability, is the ſtrongeſt judgment for its inefficacy. It ſhall however be ſhown by and by, that theſe words *diſabled to ſit any longer as Members during that Parliament*, were the very *periphraſis* often uſed for *expel*, as appears from many inſtances quoted by the writer of the *Conſiderations* himſelf: And that they were not always intended as an expreſs diſability ſuperadded to the ſentence of expulſion.

The ſecond entry cited from the Journal of 22d Jan. 1643, relating to Mr. Holborne, "that he "be diſcharged and diſabled for ſitting any lon-"ger as a Member of this Houſe during this "Parliament;" only farther and ſtill more directly proves, that notwithſtanding a former expulſion inflicted by a ſentence in the ſame words, he actually had been re-elected and did ſit in the ſame Parliament.

As to the other anſwer made by the writer of the *Conſiderations*, that theſe two gentlemen "had been *perhaps* re-capacitated by a ſubſequent "vote, as it appears the Houſe exerciſed this "power at this time in ſeveral other inſtances;" it is ſufficient to reply that there can be no arguing where a *perhaps* is the only evidence founded upon. It is true, the Houſe did aſſume at that time a power of re-capacitating, as well as of diſabling. But that power was ſtill more abſurd than the other, if poſſible, ſeeing as judges they had no power over their own ſentence after it was paſſed: And their aſſuming it, is but an additional proof how little regard was paid to law in their proceedings. And if it proves any thing more, it is, that the Houſe would not ſtand a trial upon an incapacity, inflicted only by their reſolutions, when actually called in queſtion by a re-election in

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the teeth thereof. Beſides it is utterly inconceivable how a vote of a Houſe of Commons *re-capacitating* a perſon whom they before had expelled and diſabled, could again make him a Member, unleſs he was re-elected.

The caſe of Mr. Woolaſton, expelled 20th Feb. 1698, is unanſwerable; and is only ſtrengthened by the diſtinctions and evaſions with which it is attempted to be anſwered both by the Author of the *Caſe* and the writer of the *Conſiderations*. The facts are undeniable. Mr. Woolaſton was expelled. That is the expreſs word of the ſentence. He was immediately re-elected, and *ſat*. The Author of the *Caſe* would fain blunt the edge of this authority, by ſubſtituting for *expulſion*, the Weſtminſter-Hall term of *amotion*; and by telling us, the Houſe ſomewhat inaccurately uſed the word *expel:* And both he and the writer of the *Conſiderations* dwell upon the cauſe of the expulſion; that it was not for a crime, but for being concerned as a collector of duties, contrary to an Act of Parliament: Which being but a temporary diſqualification, and removed before his re-election, the Houſe could never mean, that the effect of their vote ſhould be *permanent*. He was only (ſay they) *removed* to carry the law into execution.

But with theſe gentlemens favour, neither they nor I have a right to argue away a clear *fact* by a ſuppoſed intention: Or (to uſe the words of the writer of the *Conſiderations*, when anſwering the argument of *another* on Sir Robert Walpole's Caſe, he heedleſsly replys to himſelf in this) "there is a fallacy in that argument which draws "conſequences from the act of any court, which "are directly oppoſite to, and contradict the "words of that court, in pronouncing the judg-"ment." The expreſs word of the Judgment in

Mr. Wollaſton's caſe is *expel*: And that word, according to the gentleman's argument, either implies incapacity in *every* inſtance, or it does it not in *any*: Becauſe being a *neceſſary* effect, it muſt *always* and uniformly be the *ſame*. But that it does not imply it in Mr. Woolaſton's caſe, theſe writers themſelves labour to prove: And one inſtance to the contrary is as good as a thouſand, to ſhow it is not *neceſſarily* included in any other: Which at once makes an end of their *neceſſary* implication.

At the ſame time when the writer of the *Conſiderations* argues from the temporary nature of the cauſe of Mr. Woolaſton's expulſion, to exclude the effect of incapacity, as neceſſarily belonging to it, he ſhould alſo recollect, that he himſelf produces as one of the inſtances for proving that expulſion implies incapacity, the caſe of Sir John Leeds expelled 10th Feb. 1620, for having ſat without taking the oaths required; and expelled for that reaſon, although he was, as the Journals ſhow, willing then to take the oaths. From which it is evident, that if the *cauſe of expulſion*, and not the *expulſion* itſelf, is the ground of incapacity, the inſtance of Sir John Leeds, was as improper an inſtance for proving that expulſion implied incapacity, as the argument on Mr. Woolaſton's caſe is unfit to prove that his expulſion was not attended with incapacity. It is therefore a general principle, and not pretended ſpecialties in a caſe, that muſt decide upon the effect of expulſion as neceſſarily implying incapacity.

Parliamentary authorities have alſo been referred to on the other ſide, for proving that a perſon expelled is not eligible into the ſame Houſe of Commons. The Author of the *Caſe* has not incumbered his argument for incapacity as implied in expulſion, with authorities of this ſort. But his co-adjutor, the writer of the *Conſiderations*, has given us

from his *dog ear'd* Journals, a long liſt of what he calls the *precedents and the expreſs declarations of the law on this head, by the Houſe of Commons, from time to time.*

Theſe writers, however, as before hinted, do do not ſeem to have been perfectly agreed in their ideas upon this part of the ſubject. The author of the *Caſe*, in giving us the "various terms in "which the ſentence of expulſion was expreſſed "before the Parliamentary ſtile had acquired that "accuracy, which it has ſince attained"—confines himſelf to thoſe before mentioned of—*ſevered* and *cut off*—*removed*—*diſcharged*—*put out*—Which, he ſays, are only ſo many ſynonymous expreſſions ſignifying expulſion: And as his argument is, that incapacity is neceſſarily implied in expulſion, however expreſſed, he avoids mentioning inſtances where particular words were uſed more directly expreſſive of an incapacity, or ſeeming to ſuperadd it to expulſion.

The writer of the *Conſiderations*, on the other hand, ſpeaking in his own ſtyle, applies the term *expel* to all the caſes he cites, whatever particular words were uſed in them; although the word *expel* hardly began to come in uſe till about the time when his liſt, excluſive of Sir Robert Walpole's caſe, ends. And he, nevertheleſs, chooſes inſtances in which terms not expreſſive of incapacity or diſability have been uſed; ſuch as *incapable*—*diſabled*, &c. becauſe his purpoſe is to ſhow from *precedents and expreſs declarations of the Houſe, that perſons expelled were not eligible.*

To this end, he has taken hold particularly of the word *diſable*, which came very often in his way in the precedents he refers to; and has given the term a new coat, cut out of the preciſion of modern language. *Diſable*, as we have diſtinctly ſhown, conſtantly in correct ſpeech, ſignifies the

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ſame as *incapacitate:* And therefore, this writer, in *ſhaping* his *Conſiderations*, has impreſſed into the ſervice the word as found in the old inaccurate Journals; and will have it to expreſs ſuch an incapacity as he is contending for; or to be an active term inflicting diſability by a ſentence.

It may, however, be firſt obſerved, that theſe two different plans of the argument in the *Caſe*, and in the *Conſiderations*, cut one another. For if, according to the Author of the *Caſe*, all the different terms, in which expulſion has been variouſly expreſſed, are ſynonymous, and incapacity always the neceſſary effect of it, however expreſſed, then thoſe caſes cited by the writer of the *Conſiderations*, in which words more directly expreſſive of incapacity and diſability are uſed, being interpreted by this general rule, fall to have no particular import or energy aſcribed to them.

On the other hand, if, with the writer of the *Conſiderations*, we underſtand a particular effect to lie in the terms uſed in the caſes cited by him, it muſt follow, that where terms of that import are not uſed, the proof of the doctrine, that incapacity is neceſſarily implied in all expulſions, fails, or is conſiderably weakened. Perhaps too, from comparing the inſtances in which the more ſimple words, *cut off*, *remove*, *diſcharge*, &c. mentioned by the Author of the *Caſe*, are uſed, with thoſe inſtances cited in the *Conſiderations*, in which the terms more emphatical of diſability are found, it may appear, that the whole are only one continued proof of the antient inaccuracy in the Parliamentary ſtyle; and that the diverſity of expreſſions is too weak a foundation to build upon it precedents of authority, or not ſtrong enough to be conſtrued into expreſs declarations of the Law, by the Houſe of Commons.

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It ought alſo to be attended to, that the writer of the *Conſiderations*, has not given the exact words of the Journals, in citing the caſes founded upon by him; although it would ſeem from the manner of the references, that he had done ſo. And 'tis apprehended nothing more than fairly tranſcribing the words of the Journals, will be neceſſary to anſwer ſome part of the arguments he has grounded on the caſes, of which he has given an account.

But, more particularly to conſider the liſt of caſes cited by the writer of the *Conſiderations*; there are fourteen, beſides Sir Robert Walpole's: And in two of them, (I now ſpeak from the Journals themſelves, not from the account given in the *Conſiderations*) viz. No. 13, Mr. *Sackville*, and No. 14, Sir *Robert Cann*, the word uſed is expel. Theſe caſes, therefore, explain nothing, but muſt be expounded by ſome others. The manner, however, in which theſe two caſes are reported in the *Conſiderations*, makes it neceſſary to give the true ſtate of them.

In Mr. *Sackville*'s caſe, expelled March 25, 1679, this writer has added to the Journals from another book, and inſtead of tranſcribing them, he tells us "it appears from Grey's debates, on "the queſtion, to addreſs the King to remove "Sackville from all his employments; that no "man had an idea that he could by law be re-"turned back upon them again. Serjeant May-"nard ſays, put him into ſuch a condition, that "Oates and Bedlow may have remedy againſt him, "and that is by expelling him the Houſe. Short "time for remedy, (ſays the writer of the *Conſi-"derations*) if the borough of Eaſt-Grinſtead, for "which Mr. Sackville then ſerved, and which I "believe, was pretty much at his command, "could have returned him again a Member of "Parliament in eight and forty hours." It

It is enough to obſerve upon this, that the Journals, and not Mr. Gray's Debates, are the authority: And from the ſentence of the Houſe, and not from Mr. Serjeant Maynard's ſpeech, is the ſenſe of Parliament to be gathered. But Grey's Debates miſplace any thing that was ſaid upon expulſion, or the effect of it, when they place it in a debate upon the queſtion for an addreſs to remove from employments after the expulſion was voted. And it ſeems as if Mr. Serjeant Maynard thought Mr. Sackville's employments protected him from the remedy, which he wiſhed Oates and Bedlow to have. All in the Journals, is "*Ordered*, That Mr. Edward Sackville be expelled this "Houſe."

"*Reſolved*, That an humble addreſs be made "to his Majeſty——for removing Mr. Edward "Sackville, from all publick employments and "truſts." The Journals therefore are no foundation for the comment in the *Conſiderations*.

Sir Robert Cann's caſe, (expelled October 28, 1680) the writer of the *Conſiderations* ſurely relates from ſome other book than the Journals; for he has not given us one word that is there. He puts this ſentence into the mouth of the Speaker, as delivered by him in pronouncing judgment:—— "That you be committed to the Tower, and you "are actually cut off from being a Member of "this Houſe, and you are no more to be a Mem-"ber of Parliament." The words in the Journals, after an addreſs committing Sir Robert to the Tower, are—— "*Ordered*, That Sir Robert "Cann be expelled this Houſe."

"And then he was brought to the bar of the "Houſe, and upon his knees received the judg-"ment of the Houſe for his expulſion from this "Houſe, and commitment to the Tower." But the writer of the *Conſiderations* had an emphaſis to lay

lay on the words, *and you are no more to be a Member of Parliament*, therefore he makes a Journal of his own to introduce them.

In two more of the caſes, we find the words, *unworthy*, and *not fit*.

Sir Edmund Sawyer's caſe is one, marked No. 3, in the *Conſiderations*. He was expelled June 21, 1628; and in the Journals the caſe ſtands thus. "Upon queſtion, Sir Edward Sawyer, for "this offence to the Houſe——to be committed "to the Tower, and to be turned out of the "Houſe, and a new writ to iſſue for a choice in "his place." This is the ſentence of expulſion, ——then follows, "2dly, to be committed to "the Tower during the pleaſure of the Houſe. "3dly, The Houſe declareth him to be unwor-"thy ever to ſit as a Member of this Houſe."

This laſt article, which is clearly no part of the ſentence of expulſion, but ſuper-added thereto; ſo far as regards the word *unworthy*, is merely ſynonymous with the word *unfit*, which is found in other caſes, where it ſhall be conſidered. In as far as the article imports a declaration of *perpetual* excluſion from the Houſe, it belongs to a particular claſs of the caſes under which the obſervation proper to be made upon it, will be met with.

The caſes of four monopoliſts (No. 4, in the *Conſiderations)* expelled Jan. 21, 1640, are thus expreſſed in the Journals,——"Reſolved upon "the queſtion, that Mr. William Sandys——is "not fit, nor ought to ſit as a Member of the "Houſe this Parliament, and that a warrant iſſue "forth——for a new writ, for electing of ano-"ther to ſerve——in his ſtead."

"*Reſolved*,——That Mr. Jo. Jacob,——ought "not to ſit as a Member of the Houſe this Parli-"ment, and that a warrant iſſue forth for a new "writ,

" writ, for electing of another to ſerve——in his " ſtead this Parliament.

" *Reſolved*,——That Mr. Thomas Webb, ought " not to ſit in this Houſe, and that a warrant iſſue " forth for a new writ for electing of another to " ſerve in his ſtead this Parliament."

" *Reſolved*, —— That Mr. Edmund Windham " ——ought not to ſit as a Member in this Houſe " this Parliament, and that a warrant iſſue forth " for a new writ, for electing of another burgeſs " to ſerve in his ſtead this Parliament."

The words uſed in theſe four inſtances amount, at the higheſt, to no more than an expulſion or excluſion from the then preſent Parliament, which pronounced the judgment; and for the true meaning and import of *that*, we muſt refer to a general obſervation to be preſently ſubmitted.

There remains then ten of the fourteen caſes, in all of which, the words, *incapable* or *diſabled*, or both, are introduced in one manner or another: And it is material to have the caſes before us, in their own words, as they ſtand in the Journals; for a good deal depends upon an accurate attention to the preciſe form of expreſſion.

In Mr. Hall's caſe, (No. 1, in the *Conſiderations*) expelled Feb. 14, 1580; after different reſolutions for fine, impriſonment, &c. the ſentence of expulſion is in the Journals thus——" *Reſolved*, " That the ſaid Mr. Hall ſhould preſently be ſe- " vered and cut off from being a Member of this " Houſe any more, during the continuance of this " preſent Parliament, and that Mr. Speaker—— " ſhould direct his warrant——for a writ——for " a new burgeſs, in the lieu and ſtead of the ſaid " Arthur Hall, ſo as before *diſabled* to be any " longer a Member of this Houſe."

The caſe of Sir John Leeds, (in No. 2, of the *Conſiderations*) expelled Feb. 10, 1620, cannot at

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all be underſtood from the *Conſiderations*. In the Journals it is not very intelligible, but it is as follows.

——" *Reſolved*, Sir John Leeds, *incapable of* " *being a Member of this Houſe, as if never return-* " *ed.*" Upon theſe words, and theſe only, reſts the expulſion.——Then proceeds the Journal.

" Mr. Crew, for Sir John Leeds——No que- " ſtion but he is incapable." " 2. He is to be " puniſhed."

" Mr. Hackwyll——to have him removed; a " writ for a new choice, and to puniſh him by " ſending him to the Tower."

" Sir John Moore——to have no queſtion made " but where it is queſtioned."

" Mr. Secretary——The fault great, eſpecially " becauſe of laſt Parliament. To order he ſhall " be *diſcharged now, and to ſerve no more this Par-* " *liament.*"

" Sir John Leeds brought to the bar, confeſ- " ſeth, he was of the Houſe laſt meeting in Par- " liament; and that he hath ſat in this Parliament " in the Houſe, and hath not taken the oaths."

" Mr. Thomas Fanſhaw——that he muſt be " puniſhed, as one that hath come into the Houſe, " not being choſen

" Sir Edward Sandes——to pay the Serjeant " his fees, and no farther puniſhment, becauſe " but negligence, no preſumption; and is willing " to take the oath."

" Mr. Chidleigh——to have an order to *diſable* " *him for this Parliament.*" " A warrant for a " new writ in his room."

Mr. Taylor's caſe, (No. 5, in the *Conſiderations*) expelled May 27, 1641, is thus:

" *Reſolved*——That Mr. William Taylor ſhall " be *expelled this Houſe*, be *made incapable of ever* " *being a Member of this Houſe*, and ſhall be forth-

" with

" with committed a priſoner to the Tower, &c."

" He was called to the bar, and there kneeling, " Mr. Speaker pronounced ſentence againſt him " accordingly."

" *Ordered*, That Mr. Speaker ſhall iſſue forth " his warrant——for electing of a Burgeſs to ſerve " in the ſtead of Mr. William Taylor, formerly " returned to ſerve——and ſince, by ſentence of " the Houſe, *expelled* the Houſe."

Mr. Benſon's caſe, (No. 6, in the *Conſiderations*) expelled, Nov. 2, 1641, is thus entered in the Journals.

" *Reſolved*, That Mr. H. Benſon, is *unworthy* " *and unfit to be a Member* of this Houſe; and ſhall " *ſit no longer as a Member of this Houſe.*"

" *Reſolved*, Mr. Benſon ſhall be forthwith ſent " for as a delinquent."

" *Reſolved* —— That Mr. Speaker ſhall iſſue " forth his warrant——for electing of another Bur- " geſs, to ſerve in his ſtead."

" *Reſolved*——That the Houſeholds, Mr. Ben- " ſon *unfit and uncapable ever to ſit in Parliament*, " *or to be a Member of this Houſe hereafter.*"

Sir Edward Deering's caſe, (No. 7, in the *Conſiderations*) expelled Feb. 2, 1641.

After a reſolution that the book, the writing of which was Sir Edward's offence, being a collection of his own ſpeeches in matters of Religion, was againſt the honour and privilege of the Houſe, and ſcandalous to the Houſe; and ordering it to be burnt by the hands of the hangman: It is

" *Reſolved*, That Sir Edward Deering ſhall be " *diſabled* to ſit as a Member of this Houſe, du- " ring this Parliament."——And farther,

" *Reſolved*, That Mr. Speaker ſhall iſſue forth " his warrant——for a new writ for the election " of a Knight, to ſerve for the county of Kent,

" in the room and place of Sir Edward Deering, " *thus disabled.*"

And after a reſolution for committing him to the Tower, &c. the Journals inform us, he was brought to the bar, and Mr. Speaker pronounced the ſentence againſt him and his book accordingly.

Mr. Trelawney's caſe, (No. 8, in the *Conſiderations)* expelled March 9, 1641, is thus:

" *Reſolved*, that Mr. Trelawney ſhall be forth-" with *put out of the Houſe, and diſabled for ſitting* " *as a Member of this Houſe, during this Parlia-*" *ment.*"

" Mr. Trelawney was called down to the bar," " and Mr. Speaker pronounced the ſentence againſt " him accordingly."

" *Reſolved*, That Mr. Speaker ſhall iſſue his " warrant——for a new writ, for electing ano-" ther Burgeſs to ſerve——in the ſtead of Mr. " Robert Trelawney, formerly choſen a Burgeſs," " and ſince *diſabled* by the vote of this Houſe."

The caſe of Mr. Long and Mr. Hook, (No. 9, in the *Conſiderations)* expelled May 12, 1642, is as follows:

" *Reſolved*, That Mr. Long and Mr. Hook are " *not fit to ſit any longer in the Houſe as Members of* " *Parliament.*"

" *Reſolved*, That Mr. Speaker ſhall ſend his " warrant——for the iſſuing of a writ for electing " of other Burgeſſes to ſerve——in the ſtead of " Mr. Long and Mr. Hook, ſo *diſabled* as afore-" ſaid."

Serjeant Hyde's caſe, (No. 10, in the *Conſiderations)* expelled Auguſt 4, 1642, is thus:

" *Reſolved*, That Serjeant Hyde ſhall be *diſ-*" *abled* to ſerve any longer in this Parliament, as " a Member of this Houſe."

N. B.

N. B. *Vide* for the warrant for a new writ after the next caſe, as under.

Sir R. Hopton and Mr. Thomas Smith's caſe, (No. 11, in the *Conſiderations*) expelled Auguſt 5, 1642, is thus:

"*Reſolved*,——That Sir Ralph Hopton ſhall "be *diſabled* to ſit as a Member of this Houſe "during this Parliament."

"*Reſolved*, That Mr. Thomas Smith ſhall be "*diſabled* to ſit as a Member of this Houſe during "this Parliament.

"*Reſolved*, That new writs ſhall be ſent for "new elections of Burgeſſes——in the place and "ſtead of Sir Ralph Hopton, and Mr. Thomas "Smith, and Mr. Serjeant Hyde, *diſabled*, by "judgment of this Houſe, to ſit any longer as "Members of this Parliament."

Sir Thomas Strickland's caſe, (No. 12, in the *Conſiderations*) expelled March 6, 1676, is particular, and is indiſtinctly reported in the *Conſiderations*.

"Mr. Speaker acquainted the Houſe, that he "had writ to Sir Thomas Strickland, informing "him, that the record of his conviction of recu-"ſancy, had been read in the Houſe, and that "the Houſe had given him that notice, that he "might offer what he could, why a writ ſhould "not iſſue for electing a Member to ſerve in his "place."

Sir Thomas's anſwer was produced and read, "Upon the debate of which matter, *Reſolved*, "That whereas it doth appear to this Houſe, that "Sir Thomas Strickland, a Member of this Houſe "is convicted of Popiſh recuſancy, that he be "from henceforth *diſabled from being any longer a* "*Member of this Houſe*."

"*Ordered*, That Mr. Speaker do iſſue out his "warrant, to make out a new writ for the elect-

" ing of a Knight of the ſhire, to ſerve in this
" preſent Parliament——in the room of the ſaid
" Sir Thomas Strickland."

Upon this caſe of Sir Thomas Strickland, the writer of the *Conſiderations*, makes this very particular obſervation, " that the diſabling of him,
" was not done by virtue of any Act of Parlia-
" ment then in force, for the firſt law (ſays he)
" which paſſed diſabling Papiſts from ſitting in ei-
" ther Houſe of Parliament, was not made 'till
" 1678, 30 Charles II." One could not have expected any thing ſo very unguarded from a writer of *conſtitutional knowledge*. Does the gentleman not know that a *Popiſh Recuſant convict* incurs a *præmunire* by the ſtatute of Elizabeth; that is, he is out of the King's protection, forfeits his lands and goods, and to be impriſoned during the King's pleaſure. If that is not a legal diſability, I know not what is. The Act of Parliament in 1678, referred to, and others of that ſort, which introduce teſts of the Proteſtant religion, exclude Papiſts; but Recuſants convict are more than diſabled, they are puniſhable with the higheſt pains.

We have given the caſes fairly, and at full length, that it may from themſelves appear how far the obſervations we have to offer upon them, are well founded or not: And we hope the words uſed in the different caſes, will have made ſuch an impreſſion upon the careful and attentive reader, that he may be ready to meet, or rather have anticipated what we are to ſay.

In the firſt place, upon receiving the caſes, it is impoſſible not to perceive a manifeſt inaccuracy of expreſſion, and an incorrectneſs in the application of it, which runs through all, and is remarkable in almoſt every one of them: Much more than ſufficient to juſtify the charge of this

ſort

fort, the Author of the *Caſe* himſelf would not avoid making. And, amongſt ſuch a variety of words, not only in the immaterial parts, but where the terms might, and are ſuppoſed to have been, of ſome particularly ſignificant import, it cannot be but the diverſity was in a very great degree owing to the inattention, and probably have proceeded from the whim and caprice of thoſe whoſe diction they were.

It therefore well deſerves to be premiſed, as a general remark, that it muſt always be very dangerous to build *Doctrine* upon looſe, indigeſted, ill-conceived, and ill-adapted expreſſions; eſpecially when ſuch doctrine was not the thing in view, to be conſidered or eſtabliſhed.

Now in all thoſe caſes, expulſion was the object; and the effect of expulſion was not the thing in contemplation. No queſtion could ariſe upon incapacity as the effect of expulſion, but on a re-election of the perſon expelled: And of ſuch caſes, Sir Robert Walpole's, and the preſent, are the only two that have occurred: Which makes the one as a precedent, and the other as a confirmation, of infinite importance. All the other caſes, if duly weighed, can be of no moment to the point now in debate, which was never once ſtirred, or made a queſtion of in any of them.

Indeed, in the nature of things, caſes *merely of expulſion* (and ſuch are all the old caſes) can furniſh no *precedents*, nor with any propriety be produced as *expreſs declarations of the Law*, as to the neceſſary or implied effect of expulſion. That belongs to quite another cauſe; unleſs there can be precedents by deciſions where there was no queſtion, or determinations without a cauſe, which is abſurd. Such caſes, much more mere words or phraſeology found in them, are not even ſo good as extra-

extrajudicial opinions: And theſe are not only incompetent in matters of legal trial, but of all others are the moſt dangerous and deſtructive method of foreſtalling juſtice.

To reſort therefore to ſo unavailable authorities on the preſent occaſion; is only to prove that the point is yet new and entire, unleſs ſo far as prejudicated by Sir Robert Walpole's caſe, and conſequently that it ought to be judged upon its own ſtrength and true principles; Sir Robert Walpole's caſe being allowed its juſt weight as a ſingle precedent, or an ambiguous and diſputed authority.

2dly. Although expulſion was the object of all thoſe caſes, and the thing to which, in a natural courſe of proceeding, they ought to have been confined, both in form and in ſubſtance; yet, as it cannot eſcape obſervation, that there are words in the caſes, which on their proper ſignification, expreſs or import diſability and incapacity, the conſideration of theſe muſt not be avoided: And they preſent themſelves under different views.

1ſt. As conſtituting the act of expulſion, or as coupled with it in the ſentence; which we ſhall poſtpone for a moment to join it with its proper yoke-fellow.

2dly. As ſuper-additions to the expulſion; importing, or ſeeming to import a direct infliction of incapacity: Which we muſt refer to the other branch of the queſtion; under which incapacity by reſolution is to be conſidered.

3dly. Where the incapacity is by the words reſtrained to that preſent Parliament by which the expulſion is pronounced: Which we ſhall conſider together with the firſt mentioned. And

Laſtly, Incapacity by the words, made perpetual and for ever to exclude from future Parliaments.

To diſpatch this laſt of *perpetual* incapacity firſt: Forlorn and abandoned as it is, even by the advocates for incapacity, who cannot help admitting that in the *better* opinion, this is not to be effected by leſs than an Act of Parliament; we have nothing to do but to conſign it to that perpetual oblivion and proſcription to which its own illegality has doomed it: Or rather, ſhould I ſay, to point it out to publick view as a proof of that *graſping* incident to all power, which the Author of the *Caſe* animadverts upon in the Houſe of Lords for invading the juriſdiction of the Commons; and as an evidence that the Houſe of Commons itſelf has, in one caſe at leaſt, often done what it could neither lawfully do, nor make lawful by doing it often.

Let this monument therefore of exceſs, inſtead of being blotted out of the books which is its own deſert, for ever ſtand as a monitor to hedge in the way of Parliament itſelf, and a perpetual beacon to warn even the wiſdom of the nation, not to *commit* their authority by exceeding their power.

The only other proper uſe to be made of it upon this occaſion, is to prove, what it undeniably does, that the caſes from the Journals ſo much relied upon in this queſtion, are no better an authority to eſtabliſh it as the Law of Parliament, that *any* incapacity is the effect of expulſion, than they are, that a *perpetual* incapacity follows it, or may, by the power of the Houſe of Commons, be annexed to it. The caſes therefore, are in reality no authority at all upon the point, but muſt, as an argument which proves too much, be allowed to prove nothing. For it is impoſſible to ſay, that the ſame reſolutions of the Houſe of Commons, ſhall be a better authority for the ſhorter, than they are for the longer incapacity; if the whole reſts only upon the authority of the reſolution: And if

it

it does not, the caſes are out of the queſtiton, and principles muſt decide it.

To return, however, to the firſt and third of the views under which the caſes preſent to us words importing or ſeeming to import diſability and incapacity; namely, as conſtituting the act of expulſion, or coupled with it in the ſentence, and reſtrained by the words themſelves to that parliament, by which the expulſion is pronounced; the following obſervations occur thereupon.

Firſt, to recur to what was before hinted, one of two things muſt be admitted. Either all expulſions are of the ſame effect, however expreſſed; which is contended indeed both by the Author of the *Caſe*, and the writer of the *Conſiderations*: And if ſo, there can be no *ſpecific* virtue in any words of diſability and incapacity found in the caſes. Or there is a virtue and emphatical ſignification in thoſe words; and then there muſt be *degrees* in the effect of expulſions: Which, if acceded to, we cannot ſtir a ſtep in this ground without impeaching the doctrine of *neceſſary* implication of incapacity in all expulſions.

This other corrolary alſo follows; that the degree of effect in the expulſion, muſt ſtand upon each particular caſe; and the ſpecial penning of the ſentence be the meaſure of reſtraining or extending the conſequences. But leaving the gentlemen to ſolve this dilemma to their own ſatisfaction, we have a juſtice to render to the caſes themſelves. And

In the next place, it is obvious, that in the caſes of moſt importance to this branch of the argument, the very act of expulſion, and its whole eſſence, is conſtituted ſolely by thoſe very words which are expreſſive of, or ſeem to import diſability and incapacity. Thus the only ſentence of expulſion pronounced upon Sir Edward Deering,

Serjeant

Serjeant Hyde, Sir Ralph Hopton, Mr. Thomas Smith, and Sir Thomas Strickland, is in theſe words—*ſhall be diſabled to ſerve any longer in this Parliament as a Member of this Houſe*; or *ſhall be diſabled to ſit as a Member of this Houſe during this Parliament*—or *that he be diſabled from being any longer a Member of this Houſe.* And in Mr. Treawney's caſe, which is of an older date, the ſentence is the ſame, only a little longer—*ſhall be forthwith put out of the Houſe, and diſabled from ſitting as a Member of this Houſe during this Parliament.*

The obſervation ſtrikes at firſt view, that in theſe caſes the word *diſabled*, however inaccurately, was uſed merely as the word *expel* is now; only, that being itſelf not ſuch a ſubſtantive term, it required to have other words added to it, to compleat the ſenſe—ſuch as, *to ſerve any longer*, or *to ſit*—or, *from being any longer a Member*, &c. it does not appear to have been ſo much as deſigned or intended to convey any emphatical ſignification, or to impreſs an active virtue of incapacity, otherwiſe than as it may be ſaid, as it now is, of the word *expel*, that it included incapacity.

And having before us ſuch apparent proofs of the inaccuracy of Parliamentary ſtile in thoſe times, it were in vain to attempt accounting for the improper uſe of words, or to torture them into, or out of, particular ſignifications. The viſible inaccuracy itſelf, is a fair ſolution, and none other need be ſought after. Nor is the improper uſe of the word *diſable*, peculiar to the antient Journals in the caſe of expulſions only. It was the term uſed to expreſs the declining of the chair, the neceſſity of which cuſtom has down to this day impoſed as a law of modeſty upon the perſon choſen to the office of ſpeaker. It is ſaid, "ſtanding in "his place he *diſabled* himſelf to undergo the

" weighty charge—and that being denied he " prayed leave to *diſable* himſelf to the King— " and he did *diſable* himſelf to the King, &c."

Multiplying words would but darken our ideas on this head. A plain common reader comparing the caſes, muſt at once ſee, that of old, *diſabled to ſit any longer as a Member of this Houſe*, was perfectly ſynonymous with the modern expreſſion, *be expelled this Houſe*; by which the perſon effectually and inſtantly ceaſes to be a Member, and becomes *unable*, or has no right to ſit any longer in the Houſe.

What elſe could it mean in the caſe of Sir Thomas Strickland, who was diſabled upon a conviction of Popiſh Recuſancy? If the conviction, which was the cauſe of the diſability, had been legally removed, as undoubtedly it was capable of being; can it be ſaid he could not have been again choſen a Member of Parliament? Yet the words cannot have a different ſignification in his caſe, or in any one of the other caſes, for they are perfectly the ſame even to a tittle of grammar.

This is yet more evident, if poſſible, from the uſe of the word *diſabled*, as introduced into ſome of the caſes, merely as a *relative*, to ſignify what, in a former part, had been expreſſed in different, but ſynonymous words; as the very notion of a relative implies.

Thus the ſentence againſt Mr. Hall, is expreſſed by the words *ſevered and cut off from being a Member*; and the writ is ordered to be iſſued inſtead of Mr. Hall, *ſo as before diſabled.* Very probably the origin of this word *diſable* in the actual ſentence of expulſion in after times, was its having been uſed ſo far back as that very antient caſe of Mr. Hall's in the way of a relative, as ſynonymous with *ſevering* and *cutting off*, by which the expulſion was then expreſſed.

In

In the caſe of Mr. Long and Mr. Hook, the ſentence is, that they are *not fit to ſit any longer in the Houſe*; and the writs go, (juſt as in Mr. Hall's caſe,) " inſtead of Mr. Long and Mr. Hook " *ſo diſabled as aforeſaid*;" though in the ſentences of expulſion, the word *diſable* is not uſed. In thoſe caſes the form of words uſed in iſſuing the writ, is exactly the ſame as in the caſes of Sir Edward Deering, Mr. Trelawney, Serjeant Hyde, Sir Ralph Hopton, and Mr. Smith; where the ſentence itſelf is expreſſed by the word *diſabled*.

This ſhows the *ſynonymy* there was underſtood to be in all the different expreſſions uſed in the ſentences of expulſion, and clearly evinces, that there was no particular emphaſis or effect intended by the word *diſabled*; but that it was, however inaccurately according to the modern preciſion of terms, uſed merely to expreſs expulſion or excluſion from the Houſe.

Nothing more than the ſame obſervation is neceſſary upon the word *incapable*, uſed in ſome of the caſes. Thus Mr. Taylor's ſentence is, that he ſhall be expelled this Houſe, be made *incapable of ever being a Member of this Houſe*: Where, were it not for the quality of perpetual, expreſſed by the word *ever*, there could be no doubt, but the word *incapable* was uſed merely as an *expletive*, and explanatory of *expelled*. And that, notwithſtanding the word *ever*, there was no perpetuity of incapacity here meant, we ſhall ſee from another obſervation to be preſently made.

The intention of the word *incapable*, is farther illuſtrated by the caſe of Sir John Leeds, which the writer of the *Conſiderations* has ſingled out as the ground of a particular obſervation. The only ſentence of expulſion againſt Sir John is in theſe words—" Reſolved, Sir Jo. Leeds *incapable of* " *being a Member of this Houſe*, as if never return-

"ed," which is ſo very inaccurate, as not to be grammar. His fault was, not taking the oath required: And though that certainly rendered him incapable of ſitting, and might, notwithſtanding his offer then to take the oath, and that as one of the Members ſaid, his not having done it before was negligence, not preſumption, provoke the Houſe to puniſh him by an expulſion for having preſumed to ſit without qualifying; yet ſurely the *incapacity* was not indelible: Nor could it, in its own nature, extend to affect his future eligibility. Indeed the ſentence itſelf reſtrains the incapacity, *to his being a Member of the Houſe*; that is, one would think, only to his continuing to ſit; and not improperly puts it on the ſame footing, as if he had never been returned.

According to the Judaical interpretation of words now inſiſted upon, it having been reſolved, that Sir John was incapable of being a Member, it might be conſtrued to mean that he was incapable of ever being a Member of the Houſe. But without ſuch a conſtruction, ſtill he was *expelled*, for he was put out of the Houſe, whatever form of words was uſed to do it: Therefore if expulſion included incapacity, he was as incapable for that Parliament as any other expelled Member could be; although his incapacity, like Mr. Woolaſton's, was ſo very *temporary*, and ſo far from being *permanent*.

If Sir John Leeds's expulſion inferred incapacity, it will indeed demonſtrate the malignant effect of any kind of expulſion, and prove the danger of tampering with effects by implication. But it will be impoſſible upon the ſame principles, to ſave Mr. Woolaſton's caſe from the effect, notwithſtanding all the laboured diſtinctions of temporary and permanent diſqualifications. For the *venemous* word *expel*, was uſed in Mr. Woolaſton's caſe, however

however inaccurately, as is now ſaid; and it is only the word *incapable* that is in the ſentence againſt Sir John Leeds; which, indeed, was as efficacious as *diſable* in the old times.

The writer of the *Conſiderations* makes a particular uſe of ſome things mentioned in the Journals to have dropt from Members in the debate upon this caſe of Sir John Leeds; the particulars of which are taken down according to the faſhion of making up Journals in thoſe days, now happily aboliſhed, to the comfort of all Members of Parliament. He quotes the words of Mr. Secretary, "order he ſhall be diſcharged now, and "to ſerve no more." And Mr. Chidley's motion "for an order to *diſable* him for this Parliament." Then (ſays this writer,) "the Houſe did not come "into this propoſition, but only ordered a new "writ to be iſſued. But this debate (adds he) "ſhows what ſenſe the principal Members entertained at that time of the power of the Houſe, "with reſpect to the *diſabling their Members* "*during the ſubſiſting Parliament.*"

It is not to anſwer this notion of the power of the Houſe to *diſable* by reſolution, that I have given theſe words of the *Conſiderations* a place here. We ſhall meet with that doctrine in its proper place to which we have reſerved what is to be ſaid upon it. But I have made the citation for the ſake of an obſervation proper to the preſent argument, and to ſhow that the writer of the *Conſiderations*, miſtook the caſe of Sir John Leeds, as he has done others of thoſe quoted by him, when he laid hold of the words of the Secretary and Mr. Chidley, as a proof of the emphatical ſignification of the term *diſable*.

In this view it was, I took the trouble to give a full extract of Sir John Leeds's caſe with the others, inſtead of the mutilated edition exhibited in the *Conſiderations*.

Conſiderations. And from this caſe particularly it does, I think, appear, (quite in oppoſition to this writer's opinion of it) that *diſabling* for this Parliament, was merely a mode of expreſſing, a ſimple expulſion at that time of day. In this ſenſe clearly Mr. Chidley uſed the words. For it is evident from the full ſtate of the caſe, that the debate among the Members was, whether or not Sir John Leeds ſhould be put out of the Houſe, or ſhould be diſcharged then and to ſerve no more that Parliament, which was Mr. Secretary's motion—Or, as Mr. Chidley expreſſed it, ſhould be diſabled for that Parliament: Or if he ſhould be allowed, on taking the oath, to continue in his ſeat, and be no farther puniſhed than by paying his fees to the Serjeant; which was what Sir Edward Sandys propoſed, who mentioned as an excuſe for Sir John, that it was negligence, and not preſumption, he had been guilty of.

It is a miſtake to ſay that the Houſe did not come into the motion made by the Secretary or Mr. Chidley, for Sir John Leeds actually ſuffered all they intended. He was put out of the Houſe, which was all that *diſabling* him, or *diſcharging* him then to ſerve no more in that Parliament meant: And ſo the very next words entered in the Journal, after thoſe that fell from Mr. Chidley, are "a "new writ in his room;" that being the laconic ſtile of the day.

This is explained by looking back to the reſolution, that Sir John was *incapable of being a Member as if never returned.* And though it may appear ſtrange, that after a ſentence of expulſion, which the above reſolution was, and the only thing there was for it, there ſhould be ſuch a debate and ſuch motions as the Secretary and Mr. Chidley made. The fact however is, it is that the entries in the Journals ſtand ſo: Neither are the motions made

by Mr. Secretary and Mr. Chidley the only ones that are miſplaced, for Mr. Hackwell's and Mr. Crew's ſpeeches to the ſame purpoſe are entered after the reſolution that Sir John was incapable. The Motion by Sir John's own friend, that he ſhould be no farther puniſhed than by paying his fees, is alſo placed after the reſolution of the Houſe by which Sir John was put out of it. Nay it is after the reſolution is recorded, that Sir John Leeds, the culprit, is introduced as brought to the bar, and making confeſſion of the fact upon which the ſentence is grounded.

The ſolution of the whole, lies in the extreme inaccuracy of the Journals. But the eſſence of the caſe conſiſts in this, and there the Journal is clear, that there was a reſolution that Sir John was incapable of being a Member, as if never returned; and that upon that reſolution only the order for a new writ proceeded: Juſt as in ſome other of the caſes, the like order proceeds upon a reſolution, that the perſon is unworthy and unfit to be a Member of the Houſe, and ſhall ſit no longer, &c. If the reſolution had been in the other words *to diſcharge him, or to diſable him*, &c. the effect had been the ſame and in no degree different, as we ſee from the other Caſes in which ſuch words were uſed.

If there is any weight in what has been ſaid upon the words expreſſive of incapacity or diſability, little need be added upon thoſe which are urged as ſignifying the extent or endurance of the alledged incapacity making it to be for the *ſubſiſting* Parliament. For theſe words are clearly neceſſary, as has been obſerved, to compleat the ſenſe of the terms *diſable*, &c. ſo as altogether to compoſe an expulſion or excluſion: And if there is no emphaſis in the main terms, the expletive words cannot infuſe it.

There

There is one thing farther to be obſerved on this matter, and it will go far to explain the true meaning of thoſe antient ſentences of expulſion. The Author of the *Caſe* has himſelf paved the way for the obſervation we are going to make. He mentions the diſtinction in former times between a ſuſpenſion and an expulſion. This ſerves to unravel all the words of diſability and endurance. For it ſeems to be pretty plain that both ſorts of expreſſions were uſed only to diſtinguiſh an expulſion or *abſolute amputation from a temporary ſuſpenſion*. So when the perſon was to be expelled, the form uſed was—that he be *ſevered* and *cut off—diſcharged—removed*—or *diſabled* from being a Member—or that he ſhall be *no longer a Member* of the Houſe *this Parliament*, which really amounted to no more, in the ſtile of thoſe times, than—that he is *not ſuſpended* for a time, but is *expelled* or *excluded* from being a Member of the Parliament.

The ſame obſervation applies to thoſe other words by which ſome of the ſentences of expulſion are expreſſed—That one is unworthy or unfit to be a member of *this Houſe*, or of *this Parliament*. Perhaps it would not be ſtretching too far to ſay, that the words ſtrictly expreſſive even of a *perpetuity*, had no other meaning than to diſtinguiſh from a ſuſpenſion. For it is hard to conceive that any Houſe of Commons could ever entertain an idea, ſo confeſſedly beyond their power, as that of preſcribing to future Parliaments, or binding them by the impoſition of a perpetual incapacity.

This very conſideration inclines me to make no great account of the declarations of incapacity ſuperadded by ſeparate reſolutions, in ſome of the caſes, to the actual ſentence of expulſion; upon which an argument is now built as to the ſenſe of Parliament of their power to diſable. Theſe ſort of reſolutions are at beſt but opinions, not judicial ſentences

ſentences of the Houſe, but rather in the way of direction to the Electors: And to them may be applied the words of Sir Edward Coke as to the objection of *nonreſiancy* to the election of a Knight of a Shire, in the caſe of Sir Thomas Bowman 9th Feb. 1620—" The Law" (ſays he) " diſtin-" guiſheth matters in ſtatutes *directory* and " *concluſory*. Direction but matter of order which " maketh nothing void: Matter of ſubſtance only " doth it. Scarce any well choſen, if matter of " order ſhall overthrow it. Hands and ſeals of " all Electors ſhould be put to their indentures, " which never done." If it could be thus argued upon a ſtatute, which is *Law*; how much more is it applicable to a *directory* opinion of the Houſe of Commons which is *not* Law.

Thus I have offered what occurred to me as a fair expoſition and argument upon thoſe old caſes which have been cited as precedents for the force of the term *expulſion*. Every one will judge for himſelf upon the caſes. For my part, I am very free to confeſs, that if thoſe caſes were ten times ſtronger than I can diſcover them to be, they would not carry away my judgment upon ſuch a point as that now in debate. My reaſons are two.

1ſt. The whole caſes are ſuch a maſs of inaccuracy, and not being *ex profeſſo* upon the point now agitated, which could only be tried in a courſe of judicial proceeding upon the re-election of a perſon expelled, and pretended to be thereby *diſabled*: That I cannot conſent to ſet up ſuch caſes as a ſtandard of the conſtitution, much leſs to ſet them up to pull it down. Caſes in 1641 and 1642, which moſt of thoſe cited are; —— in the Parliament that totally ſubverted the conſtitution, to me are not caſes of great authority.

The Journals ſhow that on the very day and date of ſome of thoſe caſes, the King and the Par-

liament were engaged in ſome of their fierceſt conteſts. Sir Edward Deering was expelled for publiſhing his own Speeches in Parliament, on the day that the Houſe petitioned the King to put the Tower of London, the forts, and the whole militia of the kingdom into hands recommended by Parliament. The conſtitution was not then *entire*.—The very cauſe of ſome of the expulſions was the conduct of the Members in the diſputes with the King.

The writer of the *Conſiderations* himſelf ſtops ſhort in his liſt, becauſe he admits "it may not "be thought fair to look into thoſe times for "precedents of the conſtitutional powers of any "branch of the legiſlature." And he only anſwers the objection by appealing to the revered names of Pym, Hamden, Holles and Glyn, who were the leading Members of the Houſe of Commons at the time of the caſes cited by him.

I honour thoſe patriots as much as any man can do: And for conſtitutional principles I reſort with pleaſure to ſome of the Parliamentary remonſtrances, in which they took ſuch a ſhare. But in things that touched perſons, I am jealous of the heat of the times; for the ſame reaſon that I look with a watchful eye upon the meaſures actually purſued with regard to the King: Some of which indiſputably, though perhaps neceſſarly, invaded the acknowledged prerogative of the crown. That, diveſting the King of the martial power, was one. And the petition for it, voted that very day Sir Edward Deering was expelled, was preſented by Mr. Pym.

Theſe great men were warmed; no wonder! And the *ſalient* acts of men into which paſſion and party will enter, are not like their deliberate digeſted works, in which they pledged themſelves to the preſent and to future ages. Not to mention that

the writer of the *Conſiderations* cannot aſſure us what part Mr. Pym, Mr. Hamden and thoſe other conſtitutional patriots, with whoſe authority he would ſanctify all the diſabling expulſions, did or did not take in them: or whether it was their opinion that prevailed, and not that of a more violent, and leſs enlightened majority, to which they were obliged to ſubmit.

Over and above all this, there is another reaſon, which I hope will never yield to any thing. Precedents I can ſubmit to, that explain, not that deſtroy the law. To ſuch, even I do not object, as by force of time have made or added to the Law in matters arbitrary and indifferent, or where there is no Law. But precedents that ſtrive with the fundamentals of the conſtitution, which is the only pillar that can ſuſtain the Law itſelf; be the times or the number of ſuch precedents what they may —*Theſe* I truſt ſhall never ſhake the ſtately fabrick of this auguſt conſtitution, or looſen the leaſt pin of the ſacred building. And in that light do I ſee, every precedent that invades the COMMON RIGHT of the ſubject; in which all Engliſhmen have a natural inheritance, the deſcent of which, I hope, no time, nor any power, ever will be able to cut off from poſterity, for whom, as well as for us, our anceſtors redeemed it with their blood.

The only caſe cited that remains untouched is that of Sir Robert Walpole, which merited a place by itſelf. The reſolution againſt Sir Robert, the Author of the *Caſe* has quoted in a moſt unfair manner; And a worſe ſign there cannot be of a writer's argument than his being afraid to look full in the face the beſt authority on his own ſide. He leaves out one half of the accumulated grounds upon which the Houſe of Commons reſolved that Mr. Walpole was incapable of being elected. His

reaſon was, that expulſion alone might appear to be the cauſe: Whereas, even that Houſe of Commons took to their aid, the pretended corruption and breach of public truſt, which, for ought we know, might be the ground of incapacity moſt relied upon. For there is ſome reaſon to ſay that breach of truſt, by mere operation of Law, diſables from holding a place of truſt, as perjury, in the nature of the thing, and by the operation of Law, neceſſarily infers inteſtability. The very penning of the ſentence againſt Sir Robert gives countenance to this conſtruſtion of it.

The writers on the other ſide labour hard to find a reaſon why, if Mr. Walpole was, *by Law*, incapable, Mr. Taylor was not declared duly elected, as Mr. Lutterel has been on the ſame ground. They tell us the equity of the Houſe of Commons would not ſuffer them to take advantage of the ſtrict rule of Law, *ignorantia juris non excuſat.*

This I both underſtand and approve. But how could there be an ignorance of a Law, which, if we give credit to the writer of the *Conſiderations*, and weight to his liſt of fourteen *precedents, and expreſs declarations of the Law on this Head by the Houſe of Commons from time to time*, was ſo univerſally known a hundred years before? The ſingle reſolution in Mr. Walpole's caſe, or that in the Middleſex election added, could not better notify this Law of incapacity than a train of precedents and expreſs declarations down from 1580, where the writer of the *Conſiderations* begins his liſt. And if theſe manifold precedents and expreſs declarations had not notified it, it only could be, becauſe they were conſidered to be no precedents at all. With what reaſon then, are they produced as precedents at this day? If, notwithſtanding ſuch a multitude of expreſs declarations, the Law really was not known at the time of Sir Robert Walpole's

Walpole's caſe, where was the Law itſelf at that time? For promulgatioh is eſſential to all Law, and a Law not promulged, is the ſame as a Law not made.

The truth is, Sir Robert Walpole's caſe firſt produced this Law of expulſion-incapacity, and like the daughter of Jupiter's brain, it was born at full ſtature and in compleat armour, fit for immediate execution, more a goddeſs of war than of wiſdom. But reſembling the falſe Deity in her celibacy too, not having been married to the conſtitution, it could have no legitimate offspring, though ſuch another occaſion was very fit to bring forth a ſecond brat of the ſame ſpurious breed.

The thing then is reduced to this, that in ſpite of all the old precedents, now ſo much inſiſted upon, it was the reſolution againſt Sir Robert Walpole, which both made and promulged this Law; and upon that caſe alone, did it ſtand before the late determination.

I muſt therefore beg pardon to treat that precedent as I think it deſerves. It is a ſingle precedent, and, I believe, in point of Law, a ſingle precedent is of no great authority. 'Tis the precedent of times I am not much in fancy with; of a Houſe of Commons led by a Tory Miniſtry, the enemies of the Houſe of Hanover, to whoſe malice and wicked deſigns againſt the liberties of this country, Sir Robert Walpole was, on account of his oppoſite attachments, ſacrificed; that the revolution-ſettlement of the Crown which thoſe traiterous enemies of their Country were meditating to overthrow, might not have the ſupport he, as an able whig Member of Parliament, was capable of giving it. Such a precedent, it is a ſhame even to mention in the days of a Prince of the Houſe of Brunſwick. It were hardly more prepoſterous to produce a deciſion of the Star Chamber,

as

as an authority in a queſtion of liberty. The votes of the Houſe of Commons, by which in the days of the perverſion of the Queen's reign, the beſt friends of the Proteſtant ſucceſſion were proſcribed as enemies to their Country, might with equal reaſon be held up to George the Third as an object of admiration, or a fit pattern to imitate.

But this caſe of Sir Robert Walpole's has been ſo much under diſcuſſion, I will not enlarge farther upon it. If the grounds of the caſe do not ſatisfy, the precedent will go for little. It is not one or two precedents, even in good times, without principles, far leſs precedents contrary to principles, that will make Law, notwithſtanding what the Author of the *Caſe* aſſerts. But one determination in a very bad time, as the end of the Queen's reign, and the decline of her glory was; and moſt eſpecially, an adjudication of a corrupted, diſaffected majority of a Houſe of Commons, devoted to a Jacobite Adminiſtration, and poiſoned with notions of arbitrary power; an adjudication oppoſed to firſt principles, and deſtructive of our prime rights, which are to be read and learned by the moſt illiterate ſubject, in the great, though unwritten code of the conſtitution; —one ſuch determination, I ſay, will not be ſufficient to make a Law in *defeazance* of the firmeſt eſtabliſhments, and to rob the ſubject of his moſt valuable priviledges. Which naturally enough leads to the conſideration of the

Third ground, upon which we propoſed to try the firſt branch of the queſtion—namely, "the conſti-" tution of the Houſe of Commons and the nature " and extent of the authority and power by which " the Houſe inflicts the puniſhment of expulſi-" on:" by which we ſhall ſee (if it can thence be ſhown) either that the power and authority is not of that ſort or ſtrength, that ſuch an effect as incapacity is within its reach: Or, on the other hand

it

it may appear, that the power and authority as ſuch, that expulſion not only may, but muſt carry that conſequence with it, as neceſſarily as a cauſe produces its effect; unleſs we admit an unnatural naming of the expulſive power, or alledge an actual reſtraint and limitation in the Act of expulſion on purpoſe to diminiſh its effect.

Now, not to enter into idle ſpeculations or vain enquiries as to the origin or antient ſtate of the Democratical branch of the legiſlature; it is fully ſufficient for our preſent purpoſe to ſay, the Houſe of Commons is founded in, and owes its being to the conſtitution: A term we all underſtand, and a thing which was not made all at once, but is the production of the progreſſive improvement of time; by which *res publica, ſi ſemel ceperit bene, progreditur tanquam circulus ſemper proficiens.* It is the life and ſoul of the ſtate, the ſpring of government, the meaſure of ſubjection, the law of power and of liberty: And itſelf exiſts, like the hidden ſubſtance of matter which is no otherwiſe known than by its viſible powers and properties.

Upon this foundation ſtands the Houſe of Commons, which, at this day, may be defined to be—the aſſembly of the repreſentatives of the people, choſen by thoſe ſeparate and diſtinct claſſes or orders of ſubjects, who, by the conſtitution, are independently of each other, inveſted with the right of election; for a limited or uncertain time to be a part of the great council of the nation, for the purpoſe of maintaining and defending the aggregate ſtock of national liberty, and to exerciſe that ſhare of the total power of the whole body politick, or great corporation of the kingdom, which conſtitutionally belongs to the people whom they repreſent.

From this definition it will follow, 1ſt. That the Houſe of Commons, not being *ſelf-created*, but made

made by the conſtitution; and being only repreſentatives choſen by the people, it cannot make its own power, becauſe it did not make itſelf: Nor can it have power to deſtroy that power from which it is derived, and by the exiſtence of which alone, it can ſubſiſt in its natural and conſtitutional ſtate.

2dly. That its power being *derivative*, it muſt be juſt ſo much, and no more, than is, and can, by the conſtitution, be delegated and derived from the conſtituents.

3dly. That being choſen by diſtinct and ſeparate claſſes and orders of ſubjects, who, *independently* of each other, have the right of election; each Member, when *duly* elected, and *legally* poſſeſſed of his ſeat which he derives *ſolely* from his conſtituents, is, in *ſtrictneſs*, and according to his true character and primary quality, *independent* as to his *repreſentative-capacity*, of every other repreſentative, and of the whole together: And cannot, from any original principle or quality of his *repreſentative-character* be deprived of it by, or accountable for the exerciſe of the powers it inveſts him with, to the body of the repreſentatives *.

4thly. The Houſe of Commons being choſen only to be a *part* of the great council of the nation, and to exerciſe that ſhare of the total *power* of the body politic, which conſtitutionally belongs to the *people*, whom they repreſent; it muſt neceſſarily follow that they cannot, by themſelves, do, what it only belongs to the *whole* council of the nation to do, and for which no leſs power is adequate or competent.

5thly. Being choſen to maintain and defend the aggregate

* I have worded this as cautiouſly and preciſely as I could; being aware of the power of expulſion, of which below: And the legal doctrine of which, I conceive, will not in the leaſt interfere with any thing here ſaid, if rightly underſtood.

aggregate ſtock of national liberty, and, particularly, to maintain and defend the rights and privileges of thoſe they repreſent; it cannot but follow, that they *ought not*, and, if their inſtitution is the rule of their power, they *will not* hurt or invade either *.

6thly. And laſtly, the end of their inſtitution and election muſt, in the nature of the thing, imply every incident and collateral power neceſſary to that end: But ſo always (which is a diſtinction inſeparable from the nature of collateral and incident powers in reſpect of the power in chief,) as ſuch incident and collateral power be, in its nature, and in the exerciſe of it, ſubordinate to, and compatible with the inſtitution, and with the due ſecurity of the ſovereign and indiſpenſible rights thereof, and of thoſe rights on which it depends, or to which it bears relation, as well as with the great ends for which the inſtitution itſelf ſubſiſts †.

Theſe principles (and we think it would not be too much to call them axioms) will, we are perſuaded, ſo ſpeak for themſelves, as to make the application of them to the preſent queſtion eaſy. But the importance of the matter will apologize for not treating it too ſuperficially.

* For them to deſtroy the rights they are choſen to maintain and defend, is murder under truſt, and may not improperly be called treaſon againſt their conſtituents and themſelves, and high treaſon againſt the conſtitution.

† The Houſe muſt have a power to adjourn as well as to ſit; to form rules for the order of their proceedings; to compel the Members to attend and do their duty; and to preſerve decency and purity in the aſſembly. In ſhort, it muſt have the power of ſelf government, and all authority neceſſary thereto: And we not only admit, but maintain as ſtrongly as any one can, that the Houſe has, and ought to have, the *ſole* power of trying and determining who are, and who are not duly choſen according to the Law of the Land to be Members of the Houſe.

If then the *repreſentative-right* and capacity of a Member of the Houſe of Commons, is, in its proper nature and primary quality, ſo very independent of the Houſe, not only as to the origin, but the enjoyment and exerciſe of the right; a power of expulſion in the Houſe, which is ſo contrary to a right of that nature, and ſo little *homogenial* with the Houſe not having any ſhare in the conſtitution of *itſelf*, muſt be very adventitious indeed; and muſt ſubſiſt for a very particular purpoſe: And therefore it muſt, of neceſſity, be as limited and reſtrained in its effects as it is poſſible for it to be; in order to preſerve ſome conſiſtency with the proper nature of the right on which it operates, and with the original want of power over it in the Houſe.

This is a propoſition of meridian clearneſs. If not ſelf-evident, it is ſo much founded in every notion that can be entertained of the different kinds of rights; ſo conſonant to plain reaſon, and indeed obvious to common ſenſe, that the mind in its natural ſtate of aptitude to diſcern and receive truth, cannot refuſe to aſſent to it: For to conteſt it is nothing elſe than to deny the natural difference of things.

The nature of the right alſo manifeſtly ſhows, that the power of expulſion can be founded upon no principle whatever but that of the ſelf-government incident to that of the Houſe of Commons. And if the power of expulſion were yet in a ſtate of formation, perhaps much might be ſaid upon principles in the way of objection to it, becauſe of the nature of the repreſentative-right. Nor are there wanting, (as we hinted very early) thoſe who are not yet perfectly reconciled to it. But time, which effects many things above the power of principle, has, we think eſtabliſhed the expulſive power: And

And in not a few caſes this even is a ſufficient anſwer to doubts, *non omnium quæ a majoribus ratio reddi poteſt.*

We muſt not, however, forget the ſource of this right of expulſion. It grows but out of a collateral and very ſubordinate power, and at the beſt is rather a heterogeneous limb even of that. But admitting it to be now fully eſtabliſhed, as we do, the other principles which exiſt in the abſolute perfect and primordial nature of the *repreſentative-right*, and are eſſential to the conſtitution of the Houſe itſelf, and conſequently are of the firſt and higheſt conſideration;—theſe interpoſe with their checks and limitations, which as naturally ſpring out of them, as water flows from its fountain.

The inſtant, therefore, that expulſion trenches upon any of thoſe other principles, it enters a foreign territory, and muſt walk ſuitably to the ground it treads upon. For ſo far as it goes there, it looſes the likeneſs of the principle of which only it can be begotten.

The genuine offspring of a power, ſo ſubordinate, and ſo controuled and bounded by the very nature of the right affected by it, muſt bear the image of the father ſo ſtrongly as to *demonſtrate* the family it belongs to: And the origin for ever will be an infallible criterion, by which to judge of the true nature and juſt extent of whatever is aſcribed to it. Any act or effect in exertion of, or proceeding from ſuch a power, but manifeſtly exceeding all natural bounds, at once baſtardizes itſelf, betrays its own pretenſions, and proclaims its ſpurious birth. Simple expulſion *may*, and that is all can be ſaid, it may be the child of ſuch a power; it does but barely conſiſt with it: But expulſion to *incapacitate* which not only crops the flower of the repreſentative-right, but cuts up its very root, both in the Electors and Elected, ſo tranſcends that

power of generation to which its Being is attributed, that it muſt be of a higher extraction, and claim a different pedigree.

Juſt only to ſkim the principles we have laid down;—The conſtitution of Parliament is the ſovereign Law of it's nature, and paramount to every other thing that can be called *the Law of Parliament*. It is a Law not made by, but, in ſome degree at leaſt, beyond the legiſlative power. As the Laws of nature impreſſed by the great Author of the Univerſe upon the works of his own hand, regulate the powers and motions of material bodies; ſo the *frame* and *make* of Parliament, is the ſupreme Law of its being and eſſence, and muſt govern its power.

That ſupreme Law has excluded from the Houſe of Commons the power of legiſlation. They are (to uſe their own words in the vindication of their excluſive juriſdiction, as to elections preſented to the diſputatious *James*)—They are "but part of "a body as to *make new Laws*." Is, or is not then, incapacity the creature of a Law? The gentlemen admit it requires an Act of Parliament to make a perpetual incapacity. But they ſay 'tis within the power of the Houſe of Commons to make one, to laſt as long as the ſame Houſe of Commons does. The Houſe of Commons then can make a *Law* but only of a ſhort endurance. Plain ſenſe cannot well comprehend ſuch a *ſliving* either of Law or of legiſlative power.

We aſk the other ſide, Who drew this line? Or in what Law, Code, or Conſtitution, written or unwritten, is it to be ſeen or read? Does it lie in the *breaſt* of the Houſe of Commons,—an *ens rationis* which exiſts in ſpeculation? Or is it a ſort of legiſlation which hovers in the clouds, and bolts out like lightning for the uſe of particular occaſions? The queſtions puzzle. Their *juſtice* gets into the *air*;

airs and after the manner of an apoſtolick viſion, we hear unſpeakable words, ſomething, I know not what, of a *magic* power of the *ſubſiſting* Parliament, of which this limited expulſive incapacity is the *efflatus*.

We know that all the powers of one Houſe of Commons muſt end with the Parliament, becauſe a dead Parliament can have no activity: And there is but one poſſible inſtance of its coming to life again. There are too, ſome of the powers of the Houſe of Commons which live and die with the ſeſſion. But there ſeems to be no logic in this conſequence, that becauſe the powers of the Houſe of Commons muſt have an end, therefore, while they laſt, it may do any thing, or do what it was never made to do.

If our principle were, that the Houſe of Commons did not make the Parliament, which is a perpetual ſucceſſion of independent Houſes of Commons, and therefore that it cannot make an incapacity for a *future* Parliament, it might be the ſhadow of an anſwer, though fallacious, to ſay—it may nevertheleſs, with the power it has, make one for its own Time. But our principle is that the Houſe of Commons cannot make its own power, becauſe it did not make itſelf, and no ſuch power is given or delegated to it, as can create *any* incapacity, becauſe incapacity requires a Law to produce it.

If the Houſe of Commons were it's own electors; were it αυτοχειροτονειτος, created by its own ſuffrages, they might as eaſily make an incapacity as inflict an expulſion, and needed but to infuſe the one into the other to make the effect follow by a *cauſal* neceſſity. But the thing denied is the exiſtence of the power to make an incapacity; and therefore it is no diſmembering of the expulſive power, nor does it require any limitation in the

the expulsive act, to exclude an effect which does not, and cannot naturally belong to it.

The right of election is in the people, and they hold it not only under the immediate protection of the House of Commons, who are bound to defend it; but they hold it absolutely independent of the House, and controuled by nothing but the Law of the Land. I do not say, they hold the *exercise* of the right independent of them; for that is subject to their judicature in cases of election, as the possession of the right also is. But I deny that the *right* of election is subject in any degree to them; and I shall prove it is not, before I have done. Nor shall I take for an answer to bring the right itself within the *vortex* of the jurisdiction of the House of Commons, what has been said of the right of being elected, *viz.* that the right of electing too, is a *parliamentary* right, because it is to be exercised *for*, as the other is to be *in* Parliament.

Passing this, however, for the present, I repeat it, the people hold the right of election absolutely independent of the House of Commons, and the representatives themselves hold their representative right also independent of the House, with this single limitation of being liable to expulsion with its just and constitutional effects. Do the gentlemen then recollect what incapacity is?—That it is laid not upon the person expelled only, nor upon his own immediate constituents only; but upon all the Electors of England? And shall the House of Commons, in the person of one man, disfranchise all the people of England?—The House of Commons bound to maintain and defend all the privileges of the people—The House of Commons which cannot make a Law to deprive the meanest subject of the lowest right.—Yet *disfranchising* them it is; for the unlimited freedom of election controuled by nothing but the Law of the Land, is

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of the eſſence of the franchiſe: And if reſtrained but as to one ſubject who is legally capable, and whom the Law has not incapacitated; (and it muſt be to as many as the Houſe in their wiſdom and direction thinks fit to expel) the franchiſe is ſo far diminiſhed, it is ſo far cut off.

The Author of the *Caſe* may tell us, as he does with great gravity, that "though the Houſe cannot, and God forbid they ever ſhould, ſay, "whom the Electors ſhall chooſe; yet they may "declare who by Law are not to be choſen: And "by expelling a Member, they declare without "ſaying more, that he is incapable of being "elected for that Parliament."

But this is only *after the manner* of our Author: For there is all the difference in the world between declaring who *by Law* are not to be choſen, and declaring without ſaying more, that is ſilently making a perſon incapable by expulſion without any Law for it. Language long ago uſed in Parliament has taught me this plain and ſound doctrine, that "it being the great privilege with Engliſhmen, "that they are not to be taxed but by their repreſentatives; it is a *diſinheriting* them of the main "part of their *birth-right* to do any thing that "ſhould ſhut them out from their *free* votes in "electing." This expulſion-incapacity however, does it.

But with what part of the conſtitution or power of the Houſe of Commons does this quadrate? It is totally diſcordant with the origin, the nature, and end of the inſtitution—with the conſtitution of Parliament, which is emphatically the Law of Parliament.

Were ſuch the omnipotence of the Houſe of Commons (for on ſuch an occaſion we may call it ſo, though it is a bold figure, as the Author of the *Caſe* obſerves) why could it not disfranchiſe a venal

venal borough that had juſtly incurred their higheſt indignation? Why order in a bill to cut off the corrupt corporation of Stockbridge? Might they not by a vote have incapacitated them for the *ſubſiſting* Parliament at leaſt: Or expelled them from the Parliament roll?——A power, by the way, which, though it may be a queſtion *in apicibus juris*, how far it extends, cannot certainly be infinite, or the conſtitution might ſoon devolve. Was an excluſion of one proſtitute borough more than an incapacity upon all the Electors of England, be it but as to one man, and for the ſubſiſting Parliament.

It ſurely is not neceſſary, after what has been ſaid, to compare the preſent caſe with other inſtances of exceſs of the conſtitutional powers in the Houſe of Commons. Do they want to retrive all the power to which they ever made pretenſions? The *Journal-mongers* may find in their muſty *records* among the four parliamentary judicatures, one that was exerciſed before the Peers and Commons together. They may ſend us to the folios of the *Placita Parliamenti*, to ſtudy the barbarous learning of caſes adjudged by the Prelates, Earls, Barons, and community of England, and by the Lords *and* Commons.—They may themſelves conſult the ſentences of fine, impriſonment, pillory, and much more, pronounced by the Houſe of Commons, for crimes at common Law againſt Berresford and others, who were not Members of Parliament; and particularly the famous caſe which is the magazine of the learning now raked up about the Houſe of Commons being a court of *record:* I mean the caſe of Lloyd, whom the Commons, *in the Commons Houſe of Parliament*, did *adjudge and award* to ſuffer a ſtrange puniſhment for ſlandering the King's daughter: A precedent not attempted, I believe, to be followed ſince Cromwell's Houſe of Commons (fanaticks as they were themſelves of the

the worſt kind) inflicted a cruel doom of that ſort upon a poor frantick fanatick. They may try to revive the diſpute which that caſe of Lloyd's brought on with the Houſe of Peers for invading their juriſdiction, and which ended with a ſort of compromiſe adviſed by the ſollicitor general "that "it would do no harm to agree that no uſe of that "precedent ſhould thereafter be made, for increa-"ſing the power of the Houſe of Commons, or "abridging that of the Houſe of Lords."

Theſe, and much more of that rubbiſh to be found in the Journals, are all *precedents*: And precedents, we are told, are the *Law of Parliament*, which is ſet up as a part of the Law of the Land, but only to devour it, as Pharaoh's lean kine did the fat.

The Conſtitution is, we hope, now in a ſtate of maturity, and the waves of fluctuation calmed: And as a man naturally robuſt and prudently temperate, ſeldom needs medicines, we truſt a conſtitution ſo well moulded in its form, and ſo happily preſerved in its ſhape, as ours has been, does not require daily or much repair. Conteſts, like the preſent, helped to ſettle the conſtitution, and to fix the bounds of Parliamentary juriſdiction. The preſent diſpute may tend to brighten the land marks, and, we hope, it will have no worſe effect.

The Author of the *Caſe* has been at great pains to give us a full hiſtory of the attempts of the Houſe of Lords, to invade the excluſive judicature of the Commons in matters of elections. Gentlemen ſo converſant in the Journals, cannot have overlooked the inſtances in which the Houſe of Commons, as the guardians of the rights of the people of England, alſo made their ſtand againſt the Lords, in ſupport of the *Law of the Land*.

It is worth while to obſerve the ſpirit with which the Commons reſiſted the Lords, when they at-

tempted, in 1667-8, to erect themſelves into an *original* judicature to try cauſes in the caſe of Skinner, who, upon his petition to the Lords, got a decree for 5000*l.* damages againſt the Eaſt India Company. The Commons ordered Skinner into cuſtody, for applying originally to the Lords in a *common plea*, which they, with great truth, ſaid *was not agreeable to Law*; and they voted, "that "whoever ſhould be aiding or aſſiſting, in putting "in execution the order, or ſentence of the Houſe "of Lords, in the caſe of Thomas Skinner, againſt "the Eaſt India Company, ſhould be deemed a "BETRAYER OF THE RIGHTS AND LIBERTIES OF "THE COMMONS OF ENGLAND, and an infringer "of the privileges of the Houſe."

The diſpute between the Houſes produced a prorogation of the Parliament. But the people of England have reaped the benefit of the attention the Houſe of Commons in that inſtance gave to their rights and liberties: for the like attempt has not ſince been made *.

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* A late proceeding in the ſame place, nearly connected with this buſineſs, was thought by ſome to carry too much the aſpect of exerciſing an original, and not a very competent criminal juriſdiction. It is not to be wondered at, if the leaſt appearance of that ſort carried an alarm with it: for the diſtinctions of juriſdiction and the forms of trial, eſpecially in criminal matters, are eſſential to the liberty of the ſubject. To ſay the truth, the Houſe of Lords have been remarkably tender of aſſuming or extending their juriſdiction: which makes the attempt in the caſe of Skinner the more ſurpriſing. The appellate juriſdiction of the Lords, upon writs of error from the courts of common Law, was very early eſtabliſhed beyond diſpute; But it was long before appeals from courts of equity made their way. Which is the reaſon of the many proceedings we ſee in the Journals of the Houſe of Commons upon complaints againſt decrees of the court of Chancery, and acts of Parliament to reverſe and confirm them, particularly while lord Bacon held the Great Seal. About that period, the growing juriſdiction of the court of Chancery was much inveighed againſt as a grievance. At laſt, upon a perſonal complaint

The Lords not long after returned the compliment, and ſtood forth as the protectors of the people's rights againſt the Commons, when they pretended, in a ſtrange manner, to extend the privilege of their Houſe to ſtop an appeal in a cauſe of a Member of Parliament. The Lords, as faithful to the privileges of the people, as ſteady to maintain *their* own juriſdiction, nobly oppoſed that uſurpation of privilege by the Houſe of Commons, becauſe, as they juſtly ſaid, ſuch a privilege would induce a total failure of juſtice in the land: And the diſpute between the two Houſes went ſo far, that the King was obliged to prorogue the Parliament on account of it. But the fruit of the conteſt has been, that the Commons have not ſince pretended to a privilege ſo unconſtitutional and deſtructive.

The comfort miniſtered by ſuch inſtances, is, that when incroachments of any kind are made upon the rights of the people, in a free conſtitution ſo well ballanced as this is, the people find protectors for their rights, whoever invade them, and the evils produce their own remedy. We do not therefore think we have gone out of our way, to bring up to view, on this occaſion, ſucceſsful vindications that have been made in former times, not only of Parliamentary juriſdiction, which the Author of the *Caſe* goes ſo much aſide to aſſert for the Houſe of Commons; but of the *common Law of the*

complaint to the Houſe of Lords againſt Lord Bacon, on account of a decree of his, the foundation of appeals to Parliament was laid, which is now the regular courſe of juſtice, and of the juriſdiction of the Lords, as the undoubted Law of Parliament. But if the Lords ever were to aſſume an *original* juriſdiction, either in civil or in criminal cauſes, except upon impeachments of the Commons, who are the GRAND INQUEST of the nation; there is an end of liberty, and MAGNA CHARTA itſelf is laid in the grave.

Land, and the COMMON RIGHT of the ſubject; which is the very *heart* of the Queſtion now actually in diſpute. It is to be hoped, every right of the people, eſpecially the great right of free elections, will always be ſecure under the protection the conſtitution has provided for it, whether that muſt be ſought for in one branch or another of the well poiſed powers of the great machine of government.

Let each part of the legiſlature poſſeſs its own ſhare of authority. No good ſubject wiſhes at this time of day to diſturb ſettled poſſeſſion. We do not even for *retaliation*, deſire to recall the times in which the powers of the Commons were more cramped than at preſent;—when they went to the Lords for releaſe of their own Members, even of their Speaker, when impriſoned in breach of privilege—and went without ſucceſs; nay, were obliged to have ſpecial acts of Parliament to diſcharge out of cuſtody the ſervant of a Member of Parliament: We want not to revive ſuch reſtraints upon the power of the Houſe of Commons, as we read of in Lord Coke, who tells us, "it was the "Law and cuſtom of Parliament, that when any "new device was moved in the King's behalf in "Parliament for his aid, or the like, the Com-"mons might anſwer that they tendered the King's "eſtate, and were ready to aid the ſame, only in "this new device they *dare* not agree without "conference with their countries." Whereby it appeareth (as his lordſhip adds) "that ſuch confe-"rence is warrantable *by the Law and Cuſtom* of "Parliament."

This is, perhaps, not the only inſtance of the Law of Parliament, which the Houſe of Commons at this day would chooſe to call *obſolete*. But let not the advocates for the power of the Houſe of Commons injudiciouſly uſe this ſame weapon of

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the Law of Parliament, which they may ſee has two edges, though probably it is moſt blunted on that ſide they would be leaſt fond to whet.

On the other hand, they muſt ſuffer the friends of liberty to hold up the conſtitution of Parliament, which is its higheſt Law, and the true principles on which all the power of Parliament is founded, as a defence for the rights and privileges of the people; which has always been uſed when they were attacked. We ſhall take the liberty to think, and we hope we are yet *free* ſo to do, till better arguments or authorities, than any we have yet ſeen, are produced, that there is no warrant for incapacity, as the neceſſary effect of expulſion, either in the conſtitution of the Houſe of Commons, or in any power which to us is known to belong to it: To prove which, we devoted this third head of the grounds or principles on which the firſt branch of the queſtion ought to be tried.

There remains only to conclude the diſcuſſion of this firſt branch, the forth ground or principle by which we propoſed to examine it, namely, "the end and deſign, or the uſe and purpoſe of "expulſion, from which it will appear, if it can "be made appear, that expulſion does not anſwer "its manifeſt end, unleſs it includes incapacity: "And conſequently the neceſſity of its implying "ſuch an effect, will be demonſtrated; or it will "be ſhown on the other hand, that it would be "as uſeleſs, as unfit and improper that it ſhould "go ſo far."

There can be but *theſe* uſes in expulſion——to puniſh the Member as an example for preſerving order and preventing offences—to preſerve the purity of the Houſe—and to ſecure to the conſtituents a proper repreſentation.

To begin to the laſt, which is, out of ſight, the greateſt

greateſt of the three; *expulſion* without incapacity ſecures this end, becauſe it gives the conſtituents a new choice: And had it not been for this, I doubt much if expulſion had ever been found among the powers of the Houſe of Commons. The beſt ſolution of a thing ſo contrary to the origin and nature of a ſeat in that Houſe, may perhaps be this, that the conſtituents could not recall their own commiſſion: And therefore it is *in the Houſe* to expel, that there may be room for a new choice, when they are of opinion a perſon formerly choſen is unfit to ſit.

But till I ſee, what can never happen, the Houſe of Commons made the *Judges* of the fitneſs of the people's repreſentatives, I cannot ſee why expulſion, which is the act of the Houſe, ſhould infer incapacity, only to reſtrain the free choice of the conſtituents. The conſtitution, ſo far as I have been able to diſcover, has reſerved to the Electors themſelves, under the limitations of Law, to judge who are fit to repreſent them: And if they ſhould differ in opinion with the Houſe, they have the beſt right to judge, becauſe they have the greateſt intereſt in the choice. For as the beſt writers on government have obſerved, nothing more requires freedom and indifference, than this of electing Members to ſerve for us in Parliament, who have put into their hands the power of our eſtates, of our liberties, of our lives; and therefore it is but reaſon, that thoſe who are ſo much concerned in the determination of the perſons to be elected, may have a free and indifferent choice of them. The opinion of the Houſe expreſſed by their expulſion, will naturally have all the weight it deſerves, as an advice or direction to the Electors, and the conſtitution or Law only can give them a negative. But ſuch a negative is ſo contrary to the nature of *repreſentation*, that it is nothing more

than reaſonable to require a very clear and poſitive law for it.

As to preſerving the purity of the Houſe, it does not ſeem to be too much to ſuppoſe that the Laws of the Land are ſufficient for that purpoſe. One whom the Law of the Land has deemed unfit to be in Parliament, cannot be choſen, becauſe he is under a *legal* incapacity: And I know no other legal way of determining who is fit but this, that every one muſt be deemed fit, in a *legal ſenſe*, whom the Law has not declared to be unfit.

But ſuppoſing a particular inſtance, which cannot be ſuppoſed often to occur, that a perſon was in a moral ſenſe very unfit, though not under an abſolute legal exception; ſuch unfitneſs muſt ariſe from ſomething, that the Law can take notice of, or it is nothing to any legal purpoſe; and if it does ariſe from ſuch a thing, and Electors ſhould notwithſtanding chooſe ſuch a perſon (which is a ſuppoſition ſo contrary to the natural courſe of things, as hardly to be an object of legal attention) ſtill there does not appear to be a defect of remedy, even in *the courſe of Parliament*. The Houſe of Commons has the power of impeachment; and upon impeachment, the Houſe of Lords have a legal juriſdiction over all the ſubjects in the kingdom, and can, by a ſentence, in the courſe of a legal trial, according to the Law of the Land, declare a perſon incapable of holding any place of publick truſt, which will effectually take him out of the way of miſguided Electors.

This has been often practiſed by the Houſe of Commons, and it ſeems particularly to have been the old faſhioned courſe of Parliament, for the Commons to carry members of their own before the Lords, for puniſhments beyond the legal power of the Commons to inflict. It did ſo with Sir

Giles

Giles Monpeſſon and Sir John Bennett; and after Sir Giles was expelled, he was by judgment of the Lords confiſcated, degraded, rendered infamous, and incapable of public truſt, &c.

To ſay but a word to the other object of expulſion, as a puniſhment, for example, to preſerve order and prevent offences; no cenſure of the Houſe of Commons to perſons of that rank that intitles them to ſit there, can be eſteemed a light thing: And cenſures much lower than expulſion, have, in general, been found ſufficient to preſerve internal order and decency. Expulſion muſt be felt as a very high cenſure. It puniſhes the preſent offence moſt ſenſibly; and if a Member expelled is re-elected, and does not again offend, the cenſure has had its effect. If he tranſgreſſes afreſh, he is liable to be again expelled, and if the expulſion is juſt, it will, in a natural courſe of things, have the effect of excluſion. For we cannot argue upon a ſuppoſition that mankind are all madmen or fools.

If the cauſe of the expulſion does not convince Electors that the perſon expelled is unfit to repreſent them, it is no great ſign in favour of the expulſion: And I think it is by much the *better* opinion, that the judgment of the conſtituents ought to prevail over that of the Houſe, ſuppoſing them both to be only equally liable to err. Let me add this conſideration more—That if the power of expulſion is neceſſary to ſecure to the conſtituents and to the kingdom a proper repreſentation; ſo the free right of election may, in its turn, be uſeful to protect a fit repreſentative againſt the groundleſs fury or political frenzy of a perverted majority of a Houſe of Commons, which has had its days of havock before now, to contraſt with any period of the peoples folly. We have heard of the Parliament 1640, through the middle of whoſe expul-

ſions,

ſions, the writer of the *Conſiderations* himſelf, has been obliged to cut a line.

The Author of the *Caſe* has indeed ſpent a paragraph to inform us, that "to admit the right of "expelling, and argue that the Member expelled may be re-elected, is to contend for the "groſſeſt abſurdity; that it would expoſe the judicature of the Houſe of Commons to flagrant "inſult and contempt; and render their determinations nugatory, and of leſs weight than the "loweſt court now exiſting."

The abſurdity I commit to the argument that has been ſubmitted. As to the reſt, I am ſtrongly inclined to believe, if ever a ſentence of expulſion, even though admitted to imply no incapacity, expoſe the judicature of the Houſe of Commons to contempt; the fault will be as often in the exerciſe of the judicature, as in the inefficacy of the ſentence: And whenever it is ſo, there is no inſult. The gentlemen themſelves would perſuade us, that no expelled Member was ever re-elected before Sir Robert Walpole; and they admit it was not then known to be Law that expulſion inferred incapacity, for which reaſon the Houſe of Commons did not take the advantage of the Electors ignorance to *confer* the ſeat upon Mr. Taylor with his *minority* of votes. The fact ſtated by themſelves therefore proves, that ſentences of expulſion have met with due reverence from the people, even when they did not know that they were tied up by an incapacity.

The Houſe of Commons may truſt a wiſe and legal exerciſe of their judicature on the ſame ground as long as men are rational creatures. The people in all countries are naturally inclined to pay a reſpect to ſenates and national aſſemblies; but more eſpecially where governments have any mixture of the popular. *Qui tribunis plebis nocuiſſet ejus caput Jovi ſacrum eſſet.* And this reſpect will

certainly never be loſt, but where ſenates and aſſemblies are ſeen to proſtitute themſelves to the views and deſigns of baſe and ambitious men in power.

We might appeal to all who have ever been in Parliament, eſpecially in *theſe* days of virtue, if expulſion, which muſt at leaſt *coſt* a new election, is a nugatory puniſhment.

The conſtitution can take no notice of boroughs at the command of particular perſons, which the writer of the *Conſiderations* mentions to prove that incapacity, not expulſion, was the puniſhment chiefly intended for Mr. Sackville, who would not be eight and forty hours out of Parliament while the Borough of Eaſt Grinſtead could chooſe him. What the conſtitution takes no notice of, a legal argument has nothing to do with.

Another argument uſed by the Author of the *Caſe* deſerves to be taken notice of, not for its ſtrength on his ſide, but becauſe it excellently illuſtrates and confirms our doctrine; and may make it ſtrike more forcibly by putting his reaſoning in the ſcale againſt our principles. "The "member (he ſays) is expelled by the people of "Great Britain aſſembled by their repreſentatives, "And ſhall a part of the people, ſhall the Electors "of a particular county, ſay,—We will not be "bound by the judgment of the majority—ſhall "they be at liberty to reſtore him who had no "power to expel him?—*Certainly not*"—Anſwers our Author to himſelf with great facility; and he is a fool indeed that puts a queſtion to himſelf, that he cannot eaſily anſwer.

But I happen to be ſo unfortunate, as to apprehend that our Author's reaſon, is, from the nature of the thing, an unanſwerable one, why the expulſion ſhould *not* bind the Electors, not to re-elect, viz. exactly and preciſely, becauſe the Member

Member is expelled by the repreſentatives of the reſt of the people, that is, by thoſe who did not chooſe him, and had no right to chooſe him, and therefore ſhould not have a power to deprive the Electors of their right to chooſe him, or him of his right to ſit when he is choſen by them: Both which rights we have proved to be in their nature independent of the Houſe, and of all the other repreſentives in it, and of the whole people, but that particular body of Electors who chooſe, and by chooſing, give the right of ſitting to the perſon choſen by them.

If *they* ſhould not be at liberty to reſtore him who had no power to expel him, why ſhould *they* be at all at liberty to expel him, who had no power to bring him there at firſt. For our Author's argument is juſt as good for the one negative as the other; and there is an authority for it: *Nihil tam conveniens naturali equitali unumquodque diſſolvi, eo ligamine quo ligatum eſt.* But if a better foundation could not be laid for the power of expulſion than this argument of our Author's leaves it to ſtand upon, we ſuſpect it never yet had been found out. We have endeavoured to ſhow, how the power of expelling, though in its nature repugnant to the origin of the ſeat, does lie in a *peculiarity* of the conſtitution, as founded in the incident and inferior power of ſelf-government, ſubordinate to, but conſiſtent with the great end of an independent repreſentative-right, and neceſſary to preſerve a pure repreſentation.

It is more natural that the conſtituents who have the power to make, and alſo the power to unmake the Member at ev ry new election, ſhould be at liberty to exert that power *freely*, than that the Houſe, who cannot make, but only can expel him, ſhould have power to reſtrain the Electors, as a ſort of acceſſion to the power of expulſi-

on, which is at beſt a very heterogeneous, and therefore a very limited power.

The other argument of *ſuppoſition* urged by our Author, will equally appear to want the ſterling quality, when brought to the touch-ſtone; as bad arguments, always do, when aſſayed by principles. He puts the caſe "that the people inſtead of being aſſembled by their repreſentatives, had been perſonally convened;" and he aſks this other queſtion, "Will any one ſay, that a perſon having a right of being preſent at that aſſembly, may not forfeit that right by indecorum, by treachery, by immorality, &c. And are not the majority of the aſſembly the ſole judges of his fitneſs to continue a Member? If they judge him incapable, may they not expel him? And can he ever acquire a ſeat in that aſſembly again, againſt the ſenſe of the majority?"

Now to bring this to a very ſhort point upon a *real* caſe, the neareſt to the one ſuppoſed that can, I believe, be figured: I aſk in my turn, if the Electors of Middleſex are aſſembled to chooſe a Member of Parliament, where every freeholder of forty ſhillings has a right by virtue of his freehold, and under the Law of the Land, to be preſent and to vote; and has that right independent of the whole body of freeholders; in that caſe, I ſay, I aſk, if the majority of the freeholders can, for any reaſon whatever, expel one of the body, or exclude him from his vote?——To uſe our Author's ſhort way of anſwering; I ſay——Certainly not. If a freeholder is riotous and breaks the peace, the ſheriff may do what is neceſſary to preſerve it. The ſheriff too is judge, in the firſt inſtance, if one who claims a right to be preſent and to vote as a freeholder, has the legal qualification.——But nobody will ſay, that the freeholders can expel a freeholder. The reaſon is apparent. He holds his

his right in himſelf independent of them: And nothing but the Law can deprive him of his vote. An inſtance could be mentioned of a perſon of rank, adjudged to be infamous by the higheſt judicature in the kingdom; who, nevertheleſs, could not be excluded from a moſt reſpectable body of freeholders; becauſe the judgment did not affect his freehold, or his right to vote. So, it is by ſpecial ſtatute only, that perjury, with regard to qualifications, incapacitates one to vote in an election of a Member of Parliament.

Finally; it is of no importance in this argument, that, as our Author obſerves, every Member when choſen ſerves for the whole nation. He muſt ſerve for the whole nation, becauſe he is elected to ſit in the council of the nation; and both the council and the nation are *indiviſible:* but if this circumſtance proves any thing, it is only, that becauſe the whole nation, as well as the particular Electors, has a property and intereſt in the ſeat, and conſequently in the capacity of every Member, the power of expulſion is not only to be the more tenderly handled, but the effects of it not to be extended beyond the natural and due bounds of the power, ſo as to hurt the intereſt of the nation, or rob it of its right.

Thus we have at a length, which it is to be feared, may rather have appeared tedious, diſcuſſed the firſt branch of this very important queſtion, viz. "whether incapacity be implied in, and the "neceſſary effect of expulſion." If what has been ſaid is of any force at all, it unavoidably anticipates, in ſome meaſure, the ſecond branch, to which we now proceed—Namely, "the authority "and effect of a reſolution of the Houſe of Com-"mons declaring an incapacity, or ineligibility."

It will be underſtood that, we here ſuppoſe with the writers on the other ſide, a *reſolution in a particular*

ticular caſe upon the trial of a return of a Member to ſerve in Parliament, adjudging that the perſon returned is incapable of being elected.

Here, it is extremely difficult to bring any one of the writers, whoſe performances we are conſidering to a conſiſtency with himſelf, and much more to make them both agree. The poſition of the Author of the *Caſe*, expreſsly and repeatedly laid down as has been ſeen, is, that "admitting "incapacity was not a neceſſary conſequence of "the expulſion, yet the expreſs declaration of in-"capacity by the reſolution was binding." And, in other parallel terms, the writer of the *Conſiderations*, is yet more incomprehenſible; he tells us page the 6th, it has been ſaid, "the Houſe of "Commons cannot by their reſolution make the "Law; they cannot, without an Act of Parlia-"ment, incapacitate any man, or body of men, "from having a right to be elected." And he inſtantly adds "I *admit* it, but this power, as ſo "ſtated, was never contended for—the matter in "diſpute is, whether the Houſe of Commons, in "matters of election, can by their reſolution with-"out an Act of Parliament *declare* the Law; and "whether if, by Law, any man, or body of men, "are excluded from being eligible into Parlia-"ment, the Houſe of Commons is not the ſole "and excluſive court of judicature, by which this "Law is to be declared, and this queſtion to be "determined: And to this (ſays he) which I take "to be the fair ſtate of the queſtion, I do not be-"lieve any man will give his negative."

But, for goodneſs ſake, why does the gentleman beat the air? Or, in his own words, Why does he combat a phantom? Is there no queſtion between us; or what would he have the queſtion to be? He admits what he ſays is ſtated on the other ſide; I admit what he ſtates as above. Are

we

we then agreed? If we are, to what purpoſe has he wrote ſuch a treatiſe as he has given us?

No: verily we are nothing leſs than agreed. For whatever be the form of this gentleman's words, and however ſtrongly and clearly he admits, as above quoted, "that the Houſe of Commons "cannot *incapacitate* any man, becauſe," (as he elſewhere plainly ſays, page the 18th) "the reſo- "lution of the Houſe of Commons cannot *make* "the Law." Yet, in reality, he is contending all the while for nothing elſe: And the fallacy, which is rather inſidious, though too groſs to deceive, lies in this, that as he advances, "the Houſe of Com- "mons can *declare* the Law; and they are the *ſole* "and *excluſive* court of judicature, by which this "Law of incapacity is to be declared, and this "queſtion of eligibility to be determined"——Ergo, what? This and nothing elſe,—that whatever the Houſe of Commons does declare to be be Law,—is Law,—becauſe there is no appeal from their juriſdiction.

With this lurking fallacy, he proceeds again to ſay, (page the 7th, lin. ult.) the "Houſe of Com- "mons declare the Law of Parliament to be, &c. "——Is this making a Law by their own reſolu- "tion? Do they ſay that Mr. Wilkes, having "been expelled, *ſhall not hereafter be re-elected in- "to this Parliament?*" In the name of wonder, if they have not ſaid *this*, What is it they have ſaid? "No (ſays the writer of the *Conſiderations*) the re- "ſolution is, we having a right to declare the "Law, and having conſulted precedents, *(and ſo "forth,)* do adjudge, that a man in Mr. Wilkes's "ſituation is, by the Law of Parliament, incapa- "citated from being elected to be a Member of "this Houſe of Commons."——Yet, but the very laſt words he had wrote, he had, by putting

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the queſtion as the ſtrongeſt kind of negation, denied that the Houſe has ſaid that *Mr. Wilkes ſhall not hereafter be re-elected into this Parliament.*

This is blowing hot and cold at a ſtrange rate. I muſt give it up as utterly unintelligible. But the point the writer at length comes to, is this, to ſhow, page the 8th, "that the Houſe of Commons have at all times, without objection or controul, exerciſed this juriſdiction of declaring by their own reſolution *ſingly*, and without an Act of Parliament, what the Law is, as to the eligibility or diſqualification of Members to ſerve in Parliament."

This, if I underſtand it, is, as I ſaid before, and it cannot be any thing elſe, that the writer is to ſhow, *that whatever the Houſe of Commons declared by their own reſolution* SINGLY *to be the Law, as to eligibility or diſqualification*, IS, and SHALL be the Law, and nothing elſe. And full, as a Trojan Horſe, of enemies under cover, he diſcharges his maſked battery of *claſſes* of perſons, the Houſe has at different times *reſolved* not to be eligible.

If the gentleman had meant no more than that the Houſe of Commons, as the judicature for matters of election, may *declare Law that exiſts*, that is, may apply the Law in being to the caſe, I have ſaid I admit it, and he ſays nobody will give it a negative, we ſhould therefore have had no diſpute. But truly it is impoſſible to chace theſe gentlemen in all their turnings and windings. Their doctrine would not ſuffer them to keep a ſtraight road. Sometimes they walk together a while, and then they joſtle one another. But they are both ſo careful to conceal, as far as it is in their power, their real drift; and for that purpoſe, they confound and convert terms ſo amazingly, that we are obliged to ferret out their deſign, before we can ſtate a fair queſtion to argue upon.

To return then to the queſtion, I am in the judgment of any intelligent perſon, who has read the *Caſe* and the *Conſiderations*, if I have miſrepreſented the real doctrine of either of the gentlemen. And the only queſtion I can ſtate upon it is this, Whether, or no, (in the words of the Author of the *Caſe*,) "admitting incapacity not to be the "*neceſſary conſequence* of expulſion, or that expul- "ſion does not of itſelf *create* incapacity, the "Houſe have a right to declare who are, and are "not eligible." Or, (as it is expreſſed in the *Conſiderations*,) "Whether the Houſe have a right "of declaring by their own reſolution *ſingly*, what "the Law is, as to eligibility or diſqualification." Which, I have ſhewn, does, and, in the mouths of theſe gentlemen, only can mean, That the Houſe *can by a reſolution upon a return incapacitate any perſon returned, by declaring him ineligible*, although there be no Law in being, other than or antecedent to the reſolution by which he is *declared* or *adjudged* to be *incapable*, i. e. is deprived of his COMMON RIGHT of being elected.

To meet this queſtion on fair ground, and to meet both the Author of the *Caſe*, and Writer of the *Conſiderations* as near as poſſible.—The firſt teſt I propoſed for trying the point was,

"The character or capacity in which the Houſe "of Commons act, when they do, and only can, "make reſolutions or adjudications with regard to "incapacity: And the nature of the power com- "petent to them in that character."

The gentlemen have anſwered this themſelves. The Houſe of Commons is acting as a "*Court*, "having a right to examine and determine re- "turns and elections, and all queſtions incident "thereto." It is the power of *judicature* they are exerciſing, and that *only*. In ſuch matters, "they are (as the Houſe aſſerted to K. James I.)

" a court of themſelves, of ſufficient power to " DISCERN and DETERMINE." I enter into no diſquiſitions or diſtinctions as to a proper or improper ſenſe of the word, *Court*, applied to the Houſe of Commons; or whether they are a court of *record*, which has been diſputed between the Lords and them: I ſhall only ſay, it is not very comprehenſible, that there ſhould be a court of record, from which no judgment, order, or proceſs can iſſue, but under the hand of the Speaker, and not from the record, or through a proper officer who can act from the record: They are a part of the high court of Parliament, and they have judicature in certain caſes, and a right judically to determine upon certain things.

Now it is a propoſition that demonſtrates itſelf, that a *court* to *diſcern* and *determine*, cannot make Law:—they are only to apply the Law that exiſts to the caſe before them. The very idea of judicature excludes the notion of making Law: And thoſe who have ſtudied the principles of government know it is a ſoleciſm in policy, to confound, or blend together legiſlative and judicial powers; becauſe it can hardly fail to produce a perverſion of juſtice. If the Houſe of Lords, who are a court of record in the moſt proper ſenſe, were in the exerciſe of their high judicature, inſtead of determining according to Law, to make a reſolution of their own to be a Law for one caſe, or for all caſes of any one line or order, their reſolution would be void: For as a court of Law, they are not to make but to expound and apply the Law.

Secondly, As the next principle or ground, on which to try this branch of the queſtion, let us enquire what is the " ſubject matter, upon which " the power competent to the Houſe of Commons " in their capacity and character, as a court to de- " termine upon elections and returns, operates or

" is

" is exercised: And what are the bounds within " which it is, in this respect, legally circumscribed." And

In general, I answer, this power of the House being *judicial*, it must, as in all other judicatures, necessarily and in the nature of the thing, operate upon every right or claim, every privilege or franchise, every character or capacity, that can, in the competent exercise of the judicature, be brought into question; whether in respect of the title to the enjoyment and exercise, or the effect and consequence of that matter or thing, so brought into question. To express myself in terms as general as I can find, I say this judicial power must reach and extend to every thing in Law, or in fact, necessary to the trial and determination of the cause before the House. But then I add, that the power being judicial only, it must also in the nature of the thing, and from the same necessity, be confined to such proceedings as are strictly judicial: For it is *but* a power of *judicature*, the House, in this instance, is exercising.

I could agree with the Author of the *Case*, that " the rights and qualifications of the Electors and " Elected, together with returns of writs, and all " matters incidental to elections"—are the subject matter upon which this jurisdiction of the House of Commons is to be exercised:——Or, that the " House has, (as he says) the sole and exclusive " power of examining and determining *those*;" but I know there is a secret equivocation in the words. Any one may see, that the sense in which the Author means that the House has a right to *determine the rights, and qualifications, and disqualifications of the Electors and Elected*, is this, that they have a right by their own authority, or by their resolution singly, to say, what is, or is not a right, a qualification, or disqualification. Indeed the

writer of the *Conſiderations* ſeems inclinable to ſtretch the power of the Houſe of Commons ſo far, that they may, under this idea of determining the rights, and qualifications, and diſqualifications of Electors, *give*, as well as take away the right of election. At leaſt I cannot ſee what elſe he means, when, for illuſtrating and confirming his doctrine on this head, he aſks this queſtion, "Has the "right claimed and exerciſed by the Houſe of "Commons ever been doubted, to determine "whether boroughs have by their ancient conſti-"tution a right to ſend Members to Parliament? "A power (ſays he) much more extenſive than "that contended for in the preſent queſtion."

To this I ſhall only anſwer, that if the Houſe of Commons were to order a writ for Manchester or Birmingham, they would, in my apprehenſion, act as much againſt the conſtitution, and againſt Law, as if they were to reſolve that the City of London has not a right to ſend *four* Members to Parliament: Becauſe that would be, by an act of theirs, to confer the Parliamentary franchiſe, which the Houſe of Commons never had, nor pretended to have the right to do; whatever the prerogative of the Crown may have been in this reſpect, which is now at an end by the *Pacta Conventa* of the Union. But in the inſtance referred to, there is nothing of *mere power*, but a fair exerciſe of the juriſdiction competent to the Houſe of Commons, while the ſubject matter of it exiſted, which it does not now in fact ſince the Union took place. For that juriſdiction intitled the Houſe to determine upon the right of a borough to Parliamentary repreſentation, as much as it did to determine upon the claim of any particular ſet of voters within a borough, acknowledged to have the right of repreſentation, to a ſhare in the election.

Still

Still in the one caſe, as well as in the other, the Houſe was to *judge* according to the right of the Law and the Caſe, whether the claiming borough had enjoyed the right of repreſentation, and had, or had not loſt it by diſcontinuance, or any other legal cauſe of amiſſion. And ſuch were the grounds of determination in all the caſes of ſuch claims that occur in the Journals. To give or confer the right, where it never had exiſted, the grant of the Crown was neceſſary, as in the caſe of Parliament, boroughs of new creation; or an Act of Parliament, as in the caſe of Wales and the counties palatine, which were joined to the Parliament of England. In thoſe caſes the Houſe of Commons had no juriſdiction, becauſe they were not caſes of judicature but of legiſlation.

Therefore it is, that in all the caſes to which the juriſdiction of the Houſe of Commons is competent, they have only a right judicially to determine, whether the parties before them have, or have not, that which the Law has made to be the right or qualification; or whether they are, or are not diſqualified by Law. And if there were any conſiſtency in the confuſed ſpeech of the writer of the *Conſiderations*, this is the only meaning of ſome of his own words: But he has no ſooner ſaid them, than he unſays them as faſt as he can.

The gentleman dare not ſay in plain terms, that the Houſe of Commons have a right under colour of examining the qualifications of the *Electors*, to determine that a freehold of forty ſhillings is not a qualification of an Elector in a county; and conſequently, by a reſolution to deprive the freeholder of his right: For which reaſon it was, we once before ſaid, the freeholder enjoys his right of election independently of the Houſe of Commons. Neither is it pretended that the Houſe of Commons, in examining and determining the qualification or diſqualification of the

Elected,

Elected, can adjudge that 300*l.* a year is not a qualification for a burgeſs, and 600*l.* for a knight of a ſhire. On the other hand, we do not deny that the Houſe has a right to examine and determine upon the fact, whether the perſon is, or is not legally poſſeſt of ſuch a qualification; and whether the Elector has legally, freely, and uncorruptedly exerciſed his right by voting. We only contend, that the right itſelf is no otherways ſubject to the examination or determination of the Houſe, than that they can declare, that by the Law ſuch is the right; not that they can make a right, or declare any thing to be a right, or qualification, which is not ſo by Law: Or that they can make an adjudication to deprive either Elector or Elected of the enjoyment or exerciſe of the right competent to them by Law.

But under the general words, *right* and *qualification*, theſe gentlemen include *capacity* and *incapacity*. Then they mean to ſay, that becauſe the Houſe has a right to examine and determine the capacity and incapacity of the Elector and Elected, they may, by the authority of their own reſolution, determine or adjudge an incapacity: that is, they may make whatever they pleaſe to be an incapacity by the mere authority of their reſolution.

We allow the Houſe has a right to examine what is *by Law* an incapacity, and to try the fact, if A or B lies under it: And upon the Law and the fact, to determine whether A or B, is capable or incapable. But we inſiſt upon it, that it is the *Law*, and *not* the *reſolution* or will of the Houſe of Commons, which makes the incapacity; and therefore that the Law muſt be the rule of this determination as to *incapacity*, as it is of the determinations with regard to *qualifications*: And that the Houſe can only ſay upon ſuch a queſtion ſtirred, that *by Law*, this or that is, or is not an incapacity, and that A or B, is, or is not under it. We maintain

maintain that the Law, and the Law only, makes the incapacity, juſt as it does the qualification of forty ſhillings, of 300 *l.* or 600 *l.* And the proceſs of examining and determining the incapacity is very ſhort: For every man, every commoner, is *capable of common right* and by *Law*: And if he has the particular qualifications required by ſpecial ſtatutes, and is not, by Law or by ſome act of the Law, incapacitated or deprived of his common right, or of the poſſeſſion or uſe of it, he is not, and cannot, by any reſolution of the Houſe of Commons, be made, declared, or adjudged to be incapable of being elected. The Law, which is the birth right and inheritance of the ſubject, ſtands in favour of COMMON RIGHT; and he who alledges an incapacity againſt any man, muſt produce the Law which makes it, and prove the fact to apply it to the perſon objected to.

So the ſtile of the Parliament men, when debating about the incapacity of the Attorney General in the reign of James I. was this; "nothing againſt "him, but he might be of the Houſe — conſide-"rable as he is a ſubject—every freeman may be "choſen—the precedents to diſable him ought to "be ſhown on the other ſide."

This the courſe of judicature, and as a court of judicature, and that only, the Houſe are acting in the examination and determination of an election or return, or of any of the matters incidental thereto. If therefore the Houſe of Commons, by a reſolution, adjudges or declares any man to be incapable of being elected when there is no Law rendering him ſo, no Law *ſtatute* or *common*; they not only make a Law inſtead of judging upon and according to the Law, which is their province as a court of judicature, but they *repeal* the COMMON RIGHT of the ſubject, which is the firſt and higheſt Law of England.

This

The Houſe of Commons cannot reſolve merely, that A is not capable, or that he is incapable for any arbitrary reaſon they pleaſe to aſſign. They are a *court* to DISCERN and DETERMINE, that is, in Lord Coke's parallel phraſe, *diſcernere per legem quid ſit juſtum.* They muſt reſolve upon the Law, and muſt ſhow the Law which creates the incapacity. Otherwiſe the reſolution is not a legal determination, but an act of power; and participates more of a bill of pains and penalties than of a judicial deciſion.

The ſame rules of judicature regulate the determinations of the Houſe as to every other matter incidental to the examining or determining a return or an election. The Houſe can reſolve that a return by a Lieutenant of a county is *no* return: But they cannot reſolve that the Sherriff is not the returning officer, becauſe *by Law* he is. They may puniſh a returning officer for not executing the writ; but they cannot reſolve, that a perſon ſhall ſit without a return, becauſe the Law requires one. When a return has been caſually loſt in the carrying the Houſe, on proof of the fact, have made a ſubſtitution for the return, as the court of Chancery in ſome caſes can repair an accident to a deed: but that is not diſpenſing with, but ſubſtantiating a return. It is purſuing, not making or repealing the Law.

In one word, the province and the power of the Houſe of Commons, acting in their capacity of judicature, is, *jus dicere*, not *jus facere:* And there needs no more than plain common ſenſe to underſtand that diſtinction.

This is no diminution of the power of the Houſe of Commons: it is the *nature*, the *Law* of *judicature.* Examples illuſtrate every thing. The Court of King's Bench, which has no power but that of judicature, can determine, that an out-law

 cannot

cannot maintain an action, becauſe, by *Law*, he is out of the protection of the Law. But they cannot adjudge that a ſubject under no legal incapacity ſhall not have any legal remedy he is by Law entitled to ſue for. They can determine whether A or B have a franchiſe in a particular corporation, but they cannot determine that a liege ſubject cannot, or ſhall not enjoy any right, which by Law he may have in any community in the kingdom.

To go back to Parliamentary judicature, the Houſe of Lords, (with which the Houſe of Commons cannot decline being compared in point of judicature;) the Houſe of Lords, I ſay, have as excluſive a juriſdiction in matters of Peerage, as the Houſe of Commons have in elections: But the Houſe of Lords, in trying a claim of Peerage, cannot reſolve that the eldeſt ſon of a Peer, ought not, or, without a legal reaſon, that he ſhall not ſucceed to his Father, becauſe by Law he is the heir of the dignity. If the claimants perſonality is queſtioned, the rules of judicature require a proof; if his legitimacy is objected to, it muſt be tried as the law directs in the ſpiritual court. But the right of ſucceſſion itſelf, is beyond the reach of any power in the Houſe of Lords to hurt it. For it is not in the power of the Houſe, by an arbitrary reſolution, to exclude a Peer from his ſeat. They cannot reſolve that a Peer ſhall not ſit in Parliament, becauſe by the conſtitution he has that right. They can only determine whether the claimant has the right of Peerage in him or not.

Hence in a caſe that has been quoted on the preſent occaſion, and mentioned but not anſwered in the *Caſe*, the Court of King's Bench juſtly paid no regard to that ſtrange order of the Houſe of Lords, by which, without a trial, Lord Banbury was, on a ſurmiſe of illegitimacy, denied the privilege

vilege of Peerage. That great man, Lord Chief Juſtice Holt, like a Judge preſiding in a Court of Law, and with the true ſpirit of an Engliſhman, ſpurned at the idea of depriving any ſubject of his *birth right*, but *per legem terræ, aut judicium parium*. He underſtood all the rights of the ſubject to be ſecured *by Law* from all incapacities, or *diſabiliſons*, without or againſt Law; And therefore he would not try Lord Banbury for a capital crime as a Commoner, while he had the plea of Peerage, of the right to which the Houſe of Lords only could take cognizance.

'Tis equally certain with regard to *incapacities*, that the Houſe of Lords in their judicature as to Peerages, can only judge according to Law. The Houſe cannot reſolve that a ſubject, under no legal incapacity, is incapable of being created a Peer: Becauſe it is the prerogative of the Crown to call up any Commoner to the Houſe of Lords. On the other hand (for one inſtance of an incapacity) they cannot reſolve that a foreigner is capable of being created a Peer, becauſe it is againſt an Act of Parliament.

In the caſe of the Peers of Scotland who obtained Patents ſince the Union, the Houſe indeed determined that ſuch Patents could not give a ſeat in the Britiſh Houſe of Lords: But it was becauſe, according to the treaty of Union, the Scotch Peerage ſat there already by repreſentation. This, however, was only determining that the Law ſtood ſo: It was not making a Law of Peerage. I the rather mentioned this caſe, becauſe it has been thought a ſtrong determination, and may ſeem, in its nature, to approach the neareſt to ſuch an adjudication of incapacity by the Commons as that in queſtion: And we ſhall meet with a ſimilar incapacity in the precedents of the Houſe of Commons, flowing alſo from the Peerage of Scotland.

Of

Of which we ſhall take the proper notice when we come to it.

The deciſion above-mentioned only put a conſtruction upon a poſitive Law, fundamental to the Union, by which the ſtate of the Scotch Peerage was unalterably fixed. It only adjudged that by that Law, which was not to be changed by Parliament itſelf, no Peer of Scotland could be in the Houſe of Lords both in perſon and by repreſentation. And in that light, the caſe correſponds with determinations as to other attempts by the Crown, to give perſons a ſeat in the Houſe of Lords upon titles repugnant to the Law of Peerage: Such as creating Peers for life, and that rare and ſtrange creation, as it was called of a *regular* Lord by Harry VIII. who gave a patent to the Abbot of Taviſtock and his ſucceſſors, to be one of the Lords ſpiritual of Parliament, though no Baron, and without a Barony: Which, it was held, the Crown could no more do, than it could make Deans and Arch Deacons, Lords of Parliament, as, without all queſtion, it cannot. Theſe deciſions of the Houſe of Lords, exactly agree with the determinations of the Houſe of Commons, that certain claſſes and orders of perſons, legally diſqualified, are by Law ineligible.

Need we farther to enlarge? Is it not ſufficient to ſay, that it is the great principle which conſtitutes the true diſtinction between freedom and ſlavery, that a free government, is a government, *by Law*, where every man knows the Law by which he is to be judged, and the ſecurity of any right does not depend upon the will of Judges, or upon a Law to be arbitrarily made by them.

With the Writer of the *Conſiderations*, we are not indeed ſo much diſputing about a doctrine, as labouring to *diſcover* a fallacy. In words, he profeſſes that the Houſe of Commons cannot make a

Law of incapacity, becauſe they are exerciſing their judicature only: But his argument abjures the principle. *His* declaration of the Law, is nothing but a making of Law: And he builds upon the ſandy foundation of the *ſole excluſive* juriſdiction of the Houſe. But of that I can make no other interpretation than this, that it reſolves all right into power: And not being a diſciple of Mr. Hobbes, I cannot ſubſcribe to ſo *Leviathan* a principle. Power is no privilege for violence. It may give ſome ſort of ſecurity in the execution, but it gives no manner of right to the committing of it.

Here, however, the Author of the *Caſe* perfectly agrees with his fellow labourer: For to the Houſe of Commons, even as a *Court of Judicature*, he directly aſcribes the effect of *legiſlative* power; at one ſtroke cutting the Gordian knot which he cannot untie. He ſays, *page* 40, *fin.* "In the preſent caſe, the Houſe of Commons acted as a "*Court of Judicature*, in a cauſe regularly before "them; their declaration therefore was the adjudication of the Court; and the adjudication of a "Court, having competent juriſdiction, more eſpecially of a Court without appeal, is the *Law* "*of the Land.*" He does not reſt here, for in *page* 30, he conveys yet a harſher doctrine if poſſible, in that piece of information mentioned formerly, that the Houſe have "*from particular circumſtances and upon general principles of conſtitutional policy, adjudged perſons incapable of being* "*elected.*"

I have before ſpoke ſomewhat of my mind how far determinations of Courts make Law. That one determination, even of a ſupreme judicature, does not, I am certain: For in the Journals of the Houſe of Lords, there can be ſhown decrees diametrically oppoſite to one another upon the ſame individual point, and in the conſtruction of one ſtatute.

ſtatute. Such decrees, ſurely, were not equally the Law of the Land, though both were intended to be according to Law: For if the firſt of them had been the Law of the Land, the ſecond could never have exiſted; unleſs upon this Author's tenet, that one determination of a Court of competent juriſdiction, is as good either to make or alter the Law as an Act of Parliament: Which is a principle, I am confident, the Houſe of Lords never did adopt, and never will avow in their judicature, though it is as ſupreme as any can be.

Our Author's poſitions emancipate not the Houſe of Commons only, but all ſupreme judicatures from the bonds of all Law whatever. It makes the will of Judges, the Law of Courts; and ſubſtitutes *policy*, inſtead of Law, to rule their deciſions. But in what country was this doctrine taught? Not in this *free Land*. If policy is the Law or the Quality of the judicature of the Houſe of Commons, which, perhaps, our Author learned from their old Journals; (we flatter ourſelves not from thoſe of the preſent time;)—We hope it is *their* peculiar prerogative. For if this *Pandora's* box of miſchiefs is opened upon the other Courts of the Kingdom, the only comfort left will be, that hope ſtays behind when the evils fly out.

We have heard of a ſhort queſtion, which a venerable perſon, now no more, long the firſt Commoner of the Kingdom, uſed to ſpeak of in *joke*, as the policy of that judicature. But it is probably the firſt time it has ever been heard of in Law: And it is to be wiſhed that nobody may ever know the *lawleſs* legal meaning of it. Whoever it is that gives us ſuch Law, woe be to him, and woe be to the policy of judicature: For woe will be to that Country where ſuch political Judges live, as are guided by policy.

If, as our Author ſays, the adjudication of a Court of competent juriſdiction, ſubject to no appeal, can make the Law of the Land; I do not know why even *ſhip money* and the *diſpenſing power* might not yet find an aſylum amongſt us. It certainly might without any difficulty if Charles the IId's and James the IId's Judges could be raiſed from the dead; and, for ſanctifying their illegall judgments, by the authority of a ſupreme judicature, which is all that is neceſſary; the *recipe* of Queen Anne's Tory miniſtry, (under whoſe bleſſed government Sir Robert Walpole was incapacitated,) were only applied to make a Houſe of Lords compoſed of ſuch men as princes of that ſtamp could never in any age be at a loſs to find for their purpoſe.

To ſay that the Houſe of Commons, in the exerciſe of their juriſdiction as to election, may, merely becauſe it is ſole and excluſive, upon policy or any other conſideration whatever but known Law, declare or adjudge any perſon incapable of being elected, is to contend for a power which, by parity of reaſon, may deſtroy the whole Laws of the kingdom that can poſſibly come within the eddy of that juriſdiction. It is indeed to make a baſiliſk of that judicature of the Houſe of Commons, to kill the Law, whenever it looks upon it. But ſuch a power as the Law cannot live *with*, cannot itſelf live *by* the Law.

Thoſe men who can find in their heart ſo to leave the Laws of the Land, and the rights and privileges of the ſubject, at the mercy of any Houſe of Commons, the beſt thatever did, or ever can exiſt, ſhould at leaſt be kind enough to their country, to procure for the Houſe a perpetual ſupply of the ſame infallible aſſiſtance, that the Church of Rome, which attributes it to the Pope to have all the Laws of the Church in his breaſt, has, for their own ſafety, provided his Holineſs

with,

with, by giving him the Holy Ghoſt for his counſil.

Such Doctrine as theſe gentlemens may prove very convenient, as, if it is eſtabliſh'd, there will be a ſpeedy end of all controverſy about *incapacities*, and ſuch ſort of things: And, indeed, there can be no ſuch thing as any right to remain, however fundamental it may heretofore have been thought, which an incapacity can breath upon. For if none but the Houſe of Commons can judge what is an incapacity, and they may judge as they pleaſe, it is no matter how much they judge againſt right: They have the authority, and their power is good, however ill their act be.

It may not be ſoon that good or wiſe men, even accuſtomed to a ſenſe of the value of their rights, will be brought outwardly to reſiſt ſuch a power: But it will be as late before any, except very bad or very fooliſh men, will inwardly approve many of the acts which are likely to proceed from it. To ſay the truth, it goes very near to reducing all fundamentals to the ludicrous definition of them long ago given by a writer of great wit, "that "whatever a man hath a deſire to do, if he hath "uncontеſted and irreſiſtible power to effect it, "he will certainly do it: And if he thinketh he "hath the power, tho' he hath it not, he will cer- "tainly go above it."

But we hope better things of our ineſtimable conſtitution, and things that accompany the preſervation of our moſt valuable rights. We truſt it is, and that it is not yet too late to maintain it to be found conſtitutional doctrine,—that the Houſe of Commons in it's juriſdiction, and judicature as to elections, is bound, and ever muſt be ruled, by LAW. Which leads to enquire, as another ground, by which to try this branch of the queſtion.

Thirdly,

Thirdly, "What is the law that governs, and "ought to govern the Houſe of Commons, in "the exerciſe of the power, belonging to that ca- "pacity, of which we have been ſpeaking; that "is, in their judicature when determining upon "elections and returns, and conſequently when "judging of incapacities: Which involves the "conſideration of the Law of Parliament; what "it is, and how far that alone, or any other ſpe- "cies of the law, is the rule of their proceeding "in ſuch caſes."

To prove that the Houſe of Commons muſt, in the exerciſe of this judicature be bound by ſome Law, were vain: For it is, as we have ſeen, implied in the very nature of judicature. And if there were no external or antecedent law which judges are only to apply, the office of a judge would ceaſe, and all judges become legiſlators.

When it is aſked, what law governs this judicature of the Houſe of Commons, it might, in all reaſon be ſufficient for anſwer, to repeat what has already been ſaid,—that whenever a particular caſe came into judgment, the Law which is proper to it, muſt rule the determination of that caſe; it being their office as judges to decide according to Law. And it has not only been obſerved, but 3 M. is in itſelf very eaſy to be conceived, how great a concern both the common and ſtatute Law of the land muſt have, in determining upon the variety of rights and qualifications which come into queſtion in caſes of elections and returns, and ſtand partly upon *common Right* and *common Law*, and partly ſpring out of, or are founded in Acts of Parliaments.

To enter therefore into a farther detail of argument upon that head, would be both ſuperfluous and nauſeous. I ſhall only mention, of the many *Parliamentary* authorities that might be cited in confir-

confirmation of what has been ſaid, as to the ſenſe Parliament has had of the binding force of the common Law upon the Houſe of Commons, what Sir Edward Coke is mentioned in the journals to have ſaid, in reporting a conference with the chancellor about a petition to James I. in the 18th of his reign, That he had anſwered the chancellor, that the Houſe had reſolved, not to alter the articles which were grounded upon the *Law of the Realm*—That they had not *poteſtatem addendi* or *minuendi*. And when it was propoſed, in the caſe of Sir John Bennet, after his expulſion, not only to ſecure his perſon, but alſo to ſecure his eſtate that he might not diſpoſe of it, Sir Edward Montague anſwered in theſe words, as entered in the journals;—"Not "to meddle with his eſtate—no precedent: *not* "*this warrantable by the common Law.*"

The anſwer, ſhort as it was, had it's effect; it made an end of the propoſition. Such is the power of the Law. And ſo true was that ancient ſaying, *plebs* EO *libere agitabat quia nullius potentia ſuper leges erat.* In that country only can the people be free, where the Law is above every other power.

So far however am I from ſetting up the authority of the common Law, in ſuch a manner as if I wiſh'd to ſhun battle as to the *Law of Parliament*, that *ſonorous* term which has been ecchoed and re-ecchoed with ſuch force upon this occaſion, that to *it*, principally, here I dedicated this particular head, on purpoſe to examine the weight of this great authority, this deciſive argument for the power and right arrogated to the Houſe of Commons.

The gentlemen on the other ſide have, indeed, made a ſort of *ſpell* of the Law of Parliament, an enchanted wand, which cauſes the moſt ſacred and inviolable Rights of the ſubject to jump out

of their ſocket, as joints that ſuffer a diſlocation. We have not ſo learned the conſtitution. To us the Law of Parliament is a very high authority, a great and reſpectable branch of the Law of the Land. But as the Parliament *ſubſiſts* by it's own proper Laws and Cuſtoms; ſo we apprehend theſe, as all the other Laws of the Kingdom, exiſt for the preſervation of the rights and liberties of the people, which the Parliament itſelf was inſtituted to ſupport and defend. And whatever be the authority or uſe of the Law of Parliament, we conceive, it will be found that the *actual exerciſe* of the judicature of the Houſe of Commons, or the determination of particular cauſes competent to their juriſdiction, reſpecting elections, are the thing it has but leaſt to do with.

That we may not (to uſe a vulgar phraſe) ſeem to ſpeak without book, we will venture to aſſert the doctrine to be collected from the writings of thoſe learned authors, who have profeſſedly treated of the *lex & conſuetudo Parliamenti* before or ſince Lord Coke, down to Dr. Blakinſton's able and uſeful Commentary upon the Laws of England; that thereby, (at leaſt in the higheſt and moſt proper, if not the only juſt ſenſe,) nothing elſe is meant or underſtood, than thoſe great principles which grow out of the *conſtitution*, the *make* and *frame* of Parliament; thoſe eſtabliſh'd uſages and cuſtoms of Parliament, which ſettle the mode of it's ſubſiſtence, and the form of its proceedings: I will add too, that aſcertain and mark out the extent and limits of its power. For omnipotent as Parliament is, (by a figure of ſpeech, not wholly unexceptionable even in reſpect to itſelf,) ſometimes ſaid to be, it ought never to be forgotten, that the CONSTITUTION is above it, and bridles it: And if that curb ever loſes its power, the conſtitution itſelf is no longer in being.

The

The Law of Parliament (but a little to diverſify the idea expreſſed under a former head,) is that which moulds its form, bounds its juriſdiction, and regulates and reſtrains its agency; either in the whole branches jointly, or in any of the three eſtates ſeparately. It is not however ſo eaſy, by any general characteriſticks, rules, definitions or deſcriptions, to convey a diſtinct idea of what is underſtood by the Law of Parliament. A few indiſputable examples of it will have a better effect to ſet the matter in a clear light, than much abſtract reaſoning.

It is the Law of Parliament, that though Parliaments cannot be abrogated, but muſt be frequent, yet they cannot meet without being called by the Sovereign; nor be opened but by the King in perſon, or his commiſſion under the Great Seal.

It is now the undiſputed Law of Parliament, that the power of judicature, properly ſo called, reſides in the Houſe of Lords. "The proceeding "on the Writ of Error (ſays Lord Coke) is only "before the Lords in the upper Houſe, *ſecundùm* "*legem & conſuetudinem Parliamenti.*"

The Commons will not deny it to be the *Law of Parliament*, that aids to the Crown and grants of money muſt begin in their Houſe. And when the Commons, in the great conteſt with the Lords inſiſted upon this as their peculiar privilege, and one of their *fundamental rights*; they explained *that* to mean a *conſtant uſage or cuſtom* according to the principles of Parliament. On this occaſion it was, they told the Lords, that when they found the contract or record for their excluſive judicature, they would ſhow them indorſed on the ſame Roll, *that* for the Commons excluſive right to grant money.

Lord Coke, ſpeaking of the Act of Parliament for ſecuring the FREEDOM OF ELECTIONS, occaſioned by the fooliſh commandment foiſted into the

Writs, not to chooſe Lawyers, ſays, that Act was but *declaratory* of the antient *Law and Cuſtom of Parliament.*

The ſame Author, when he mentions the antient anſwer to be given by the Commons, as to new devices for aids to the King, that they dare not agree without conference with their countries, adds, whereby it appeareth, that ſuch conference is warrantable by the *Law and Cuſtom of Parliament.*

Other inſtances of the Law of Parliament, reſpect the mode of its *ſubſiſting.*

Of this ſort are theſe, that the Lords and Commons muſt now ſit in ſeparate Houſes——that the Commons have the choice of their own Speaker, ſubject to the approbation of the King——and that the great officer of the Crown who holds the Great Seal, when it is not in commiſſion, has a right by office, to be Speaker of the Houſe of Lords, though he ſhould not be a Peer——That neither Houſe can exerciſe their own powers, unleſs the other is being at the time, becauſe each is but a part of the Parliament.

The following are inſtances as to the form of Elections.

Lord Coke ſays, " after the precept for election, " there ought, *ſecundùm legem & conſuetudinem* " *Parliamenti*, to be given a convenient time for " the day of election. And any election or voices " given before the precept be read and publiſhed, " are void and of no force: For the ſame Electors " after the precept read and publiſhed, may make " a new election, and alter their voices *ſecundùm* " *legem & conſuetudinem Parliamenti.*"

Under the Law of Parliament alſo, in ſomewhat of an inferior ſenſe, is comprehended what is uſually ſtiled the *Courſe of Parliament*, or the method of proceeding in accuſations, petitions, bills, committees and the like; the forms as to all which

are ſettled by the eſtabliſhed uſage and cuſtom of Parliament. Therefore Lord Coke, ſpeaking of ſome antiquated forms, ſays, "It was the *antient "Law and Cuſtom of Parliament*, that when any "man was to be charged in Parliament with a "crime, the King's writ was directed to the ſher-"riff, to ſummon the party to appear before the "King in the next Parliament." And "for pe-"titions to be preferred into the Lords Houſe in "Parliament for the countries aforeſaid, this was "the *antient conſtant Law and Cuſtom of the Par-"liament*, continued until this day." And petitions being timely preferred, have been anſwered *by the Law and Cuſtom of Parliament*, before the end of the Parliament.

To ſpecify no more particulars; it is the Law of Parliament, that there ſhall be freedom of ſpeech, and the King's name never mentioned, leſt it ſhould reſtrain debate; and that nothing that paſſes in Parliament ſhall be taken notice of in any other court. And it is the great and fundamental Law of Parliament, that the Commons may impeach any ſubject for crimes againſt the ſtate, and bring him to his trial before the Lords.

To all theſe muſt be added, what, in my own apprehenſion, has the chief, or rather, the only immediate relation to the preſent queſtion, viz. That it is the unqueſtionable Law of Parliament, that the Houſe of Commons are the ſole excluſive Judges in all matters concerning their own elections.

But if this laſt mentioned be the only part of the Law of Parliament, which has any immediate connection with this buſineſs, it may not unreaſonably be aſked, to what purpoſe we have loaded ourſelves, and incumbred our Reader, with ſo many other examples. We confeſs it requires an apology; and the anſwer to the queſtion is this.—

That

That we have not done it for the ſake of readers of any learning, of whom, we rather beg pardon for the interruption. Such Readers know what the Law of Parliament really is, and are in no hazard of being miſled by a mere ſound. But the term has been ſo bandied about, as a kind of *myſtical* expreſſion, and the gentlemen who build their whole argument upon it, inſtead of taking any pains to explain what it means, have ſo veiled it under a ſacred obſcurity, that it was really neceſſary to let it be *ſeen*, that it might appear from itſelf, that there is no myſtery in it.

The Law of Parliament has been held out as a *ſpecifick*, to cure every objection to all proceedings of the Houſe of Commons, in regard to declaring or inflicting of incapacities, only with a round aſſertion, that by the *Law of Parliament*, the Houſe of Commons has the right and power to declare an incapacity by their own reſolution *ſingly*; meaning always, that whatever they do declare to be an incapacity, is, and muſt be ſo, be it never ſo much without, or contrary to the *Law of the Land*, and to *Common Right*. This has been ſo much the caſe, that it became abſolutely neceſſary, for the ſake of thoſe who wiſh to ſee the great point in queſtion ſettled upon it's true foundations, but are not themſelves ſo converſant with conſtitutional learning, to give a juſt account of this ſame Law of Parliament: And we thought it could be done in no way with ſuch ſatisfaction, as by pointing out from acknowledged authorities, ſome of the principal, and moſt material examples of it, in it's different orders and degrees; by which any Reader may ſee with his own eyes, and judge for himſelf, upon the authority and analogy of the Law of Parliament, what influence it is of in the preſent queſtion,

Now,

Now, that this has been done, it may be referred to any one, the ſimpleſt we can conceive to be our Reader, what there is in this Law of Parliament, or that can, by any engine, be ſqueezed out of it, to authorize, or warrant this doctrine, "That the Houſe of Commons can, by it's own "reſolution ſingly, make or declare any thing to "be an incapacity, or adjudge any man to be in-"eligible, upon another ground or foundation, "beſide the Law of the Land."

Admitting, and we do not deny it, that by the Law of Parliament, the Houſe of Commons has the *excluſive* right to judge and determine in all matters of Elections; we only aſk, if it would not be as good logick, and as good ſenſe, to argue, that becauſe the Houſe of Lords have alſo their excluſive right of judicature in matters of Peerage, they might not, by a reſolution of theirs, adjudge a Peer, or the heir of a peerage, incapable of ſitting in their Houſe, becauſe they were pleaſed to think he was not fit company for them.

Such a perverſion of the *Law of Parliament*, is not more abſurd, than it would be to ſay, that becauſe there is, what is called the *Crown-Law*, (ſignifying ſome ſpecial prerogatives or privileges, which, for the intereſt of the publick, the King has in certain legal proceedings) which Crown-Law, is as truly a part of the Law of the Land, as the Law of Parliament, or any part of the Common Law is: I ſay, that becauſe there is ſuch a thing, therefore the King's judges might, in any ſuit where the Crown is concerned, make any thing they pleaſed to be Law for the King, and decide contrary to all Law, and to every right of the ſubject, in favour of the Crown; which would be a tyranny unknown, even under the deſpotiſm of the French monarchy.

To

To demonſtrate that the Houſe of Commons have not the right or power contended for, we join iſſue upon that very article of the Law of Parliament, upon which alone it is attempted to be ſupported. For we ſay, the only power *that* Law of Parliament gives them, is a power of *judicature*, which muſt proceed *judicially*, determining *according to Law*, and neceſſarily excludes the power of making Law. We appeal to the very elements of juriſprudence, to teſtify that *Judges* can only interpret and apply the Law. We call in every known example of the Law of Parliament, to prove that by *it*, the power of the Houſe of Commons, in the inſtance in queſtion, is bounded by the Laws of the Land, and the common right of the ſubject, and not left to their own will, or to any arbitrary diſcretion of theirs. We ſummon up the firſt and fundamental principles of the conſtitution, which proclaim with a loud voice, that the Houſe of Commons cannot have the power attributed to them: And that the moſt eſſential ideas of the being of Parliament, the wideſt notions of the unalterable Law of Parliament, exclude it from the whole ſcope of their moſt extended juriſdiction and authority.

If, to borrow the words of the Lords in their conteſt with the Commons about another power, the gentlemen will ſhow us any contract, and record, by which this *heteroclite* power, is, contrary to all principles, reſted in the Houſe of Commons, by force of ſome poſitive conſtitution; or, to adopt the language of the Commons themſelves, if they will ſhew us that eſtabliſhed cuſtom and uſage of Parliament which warrants it; if our opponents will but point out a ſingle book upon the Law or Conſtitution, in which it has ever been ſaid, that the power now claimed, is founded in the Law of Parliament, or in any Law of the land, they may

ſay

ſay ſomething that will deſerve an anſwer. But the firſt pretenſions to power, to power apparently contradictory to principles; pretenſions no ſooner propoſed, than diſputed; and pretenſions viſibly thwarted by the plaineſt ideas of the Conſtitution; —Theſe require ſomething more than a mere claim or aſſumption, ſomething more than one attempt to put them in *Ure*, to procure acquieſcence or ſubmiſſion.

The Law of Parliament is not the *Property* of Parliament, or made for them *only*; it is the eſtate of the ſubject, and all the people have an intereſt in it. Therefore it was well ſaid by the Commons in their proteſtation to Charles the Firſt—" That " the liberties, franchiſes, priviledges, and juriſdic- " tion of Parliament are the antient and un- " doubted birth-right and inheritance of the ſub- " jects of England." And Lord Coke in *his* ſtile, not improperly ſays, " The laws, cuſtoms, liber- " ties, and privileges of the Court of Parliament, " are the very heart-ſtrings of the common- " wealth." We are all therefore bound, for our own ſakes, to ſupport and defend the juſt rights of Parliament as we would preſerve and ſecure our liberties, which have alſo been called the life and blood of the common-wealth, and are the great inheritance of the people, whereof the other is but a part, and a part valuable no farther, than as it tends to maintain the whole. But we muſt take care that the two go hand in hand, and the one never incroach upon the other.

With regard to the point in debate, the power of the Houſe of Commons as to elections and returns, we have Lord Coke's authority in the place already cited, that the Act of Parliament for ſecuring the unreſtrained freedom of elections, was but *declaratory of the Law of Parliament*. His words are worthy to be obſerved. He tells us " that

" ſtrange innovation in the writs prohibiting to
" chooſe lawyers, was wrought by the King's Let-
" ters, by pretext of an *ordinance* in the Lord's
" Houſe. But that at the next Parliament, at
" the grievous complaint of the Commons being
" interrupted of their FREE ELECTION by thoſe let-
" ters, which were (that is in their own nature were)
" letters of *Juſtice* and *Right*, it was enacted that
" elections ſhould be freely and indifferently made
" without commandment of the King, *by writ*, or
" otherwiſe, or of *any other*, which, ſays Lord
" Coke, was a cloſe and prudent ſalve, not only
" for that ſore, but for all others in like caſe."

I ſhall leave this quotation to apply itſelf in ſome particular parts. Suffice it here to ſay, I do not find the Houſe of Commons excepted from among thoſe by whoſe commandment the freedom of elections was *not* to be reſtrained. Lord Coke ſays expreſsly, that " he which was eligible of *common right*, could not be diſabled by the ordinance in Parliament in the Lord's Houſe. And an ordinance of the Houſe of Lords was more prepoſterous than an ordinance of the Houſe of Commons to the ſame purpoſe would be, only in this, that elections of members of the Houſe of Commons ſeem to be a matter quite out of the road of the Peers. But if we would preſerve the virtue of Lord Coke's *Catholicon*; if we would have a ſure ſalve for every ſore in a like caſe, we muſt maintain this fundamental law of parliament, that was only declared, as he tells us, and confirmed by the ancient ſtatute, that all elections muſt be free, notwithſtanding any commandment of incapacity contrary to law by any power whatever.

A reſolution of the Houſe of Commons making incapacities which the law has not made, is but an *ordinance* of that Houſe; at leaſt if Lord Coke underſtood any thing of the matter it can get no

other

other name, for his definition of an ordinance is, "that it wanteth the threefold conſent, and is or-"dained by one or two of the branches of the "legiſlature." By the Law of Parliament, ſuch an ordinance is not of force to bind the people: And it is a good caution which Lord Coke gives, as to the truſt and confidence proper to be had in the different branches of the parliament, "always "provided (ſays he) that both Lords and Com-"mons keep them *within the circle of the law and* "*cuſtom of the parliament.*" Theſe indeed are the *repagula juris*, and if either Houſe of parliament break down thoſe barriers, they overleap the mounds of the conſtitution; they do not ſimply act without power, but they invade the right of the ſubject, and commence hoſtilities againſt the conſtitution itſelf.

If the Law of Parliament is adhered to as the meaſure of the power of Parliament, every right of the ſubject will be ſafe. But if every thing is to be ſanctified under the name of the Law of Parliament, which ſhall at any time be claimed as a Power by either Houſe of Parliament, the whole rights of the nation may be ſet a-float. That Houſe of Commons which ſubverted the Conſtitution, and from whoſe innumerable diſabling Expulſions, the Writer of the *Conſiderations* has drawn his authorities for *Expulſion-incapacity*—They pretended, in defence, of their *ordinance* about the Militia, by which the Crown was ſtript of one of its moſt indiſputable Prerogatives, "that they "were thereunto warranted by the *fundamental* "*Laws of the Land.*" Had things been in their natural ſtate, it was a direct attack upon the Conſtitution; and by not defending the meaſure upon the neceſſity of the Caſe, in an unnatural ſtate of things, they expoſed an Act neceſſary for the defence of the People, to the reproach of being a

wanton uſurpation, and a dangerous example of pretenſion to illegal power.

I am not fond of appealing to any thing ſaid by the unhappy king with whom that Houſe of Commons had to do; being ſatisfied that his own, and his *wife* Father's arbitrary maxims of Government, which firſt led them to break in upon the ſacred Law of Parliament, were the ſource of thoſe national misfortunes, which ended in the ſubverſion of the Conſtitution: Yet many a true word did Charles the 1ſt, taught by Counſellors more ſettled than himſelf, ſay in his diſputes with his Parliament, if he had been ſincere enough to mean what others put in his mouth to pronounce, or ſo well adviſed, as to act as they made him ſpeak: And I cannot help citing the words of one of his Memorials, which expreſs ſuch ſound Conſtitutional Doctrine, as to the Rights of the Houſe of Commons, that aſſent, I think, cannot be refuſed to it. "Whatever Privileges (ſaid he) or Liberties they had "by *any Law, or Statute*, the ſame ſhould be inviolably preſerved to them, and whatever Priviledges they enjoyed by *Cuſtom*, or *uncontroul'd* "and *lawful Precedents*, his Majeſty would be "careful to preſerve."

Law, Statute, Cuſtom, or uncontrouled and lawful Precedent, are the conſtitutional Pillars of the juſt power of the Houſe of Commons. But to Votes, Ordinances, or Reſolutions in deſtruction of the Law, and ſubverſive of the fundamental rights of the ſubject, this language muſt be applied, though it be the language of an unhappy Prince who died a martyr only to his violations of the Conſtitution. "Votes—(ſaid he, on occaſion of the Militia Ordinance) "which we muſt declare and appeal to all the world in the point, "to be the greateſt violation of our Priviledge, "the *Law of the Land*, the *Liberty of the Subject*, "and

" and the *Right of Parliament*, that can be ima-
" gined."

All votes, which may in any degree incur ſuch a cenſure, are not alike dangerous in their effects; but the leaſt hurtful of them, is of evil example. Every vote of a Houſe of Commons, that is contrary to the known Law of the Land, is againſt the Law of Parliament, for it is the firſt Law of Parliament, that the Laws of the Land are ſacred: And Parliament is either directly or indirectly the fountain of them all. Every vote that attempts to make Law, or that deprives the ſubject of his *common right*, which is *undoing* the Law, is contrary to the Law of Parliament, becauſe it is the higheſt Law of Parliament, that one branch of the legiſlature can neither make nor repeal Law.

Indeed, were it otherwiſe, how could the Houſe of Commons, as the GREAT CONSERVATOR of the LIBERTIES OF THEIR COUNTRY, thunder out their *Anathemas* againſt judges who betray the LAWS OF ENGLAND, and bring to condign puniſhment (as they often have done) the greateſt offenders, who have dared to ſubvert the RIGHTS OF THE PEOPLE.

No votes of the ſort we have mentioned, can pretend to a better father (and it is enough to damn them) than the infernal reſolutions of that execrable Rump of a garbled Houſe of Commons, (by that time thoroughly purged of all virtue, thro' means of the grand ſpecifick of expulſions and diſabilites,) which ſteeped their hands in the blood of a King, whoſe tragical *cataſtrophe*, though he did deſerve to loſe his Crown, almoſt turns all reſentment from him, to the men who murdered the Conſtitution under pretence of reſiſting his attempt to overthrow it. To the reſolutions of thoſe men, however, we muſt do the juſtice to acknowledge, they were regular and ſyſtematical; for they reſolved

ſolved firſt, " that the Commons of England aſ-
" ſembled in Parliament, had the ſupreme autho-
" rity of the nation :" after which it was very eaſy to reſolve, as the next did, " that whatſoe-
" ver was enacted and declared Law by the Com-
" mons of England aſſembled in Parliament," (which by declaring what they did, they manifeſt-ed themſelves not to be) " had the force of Law,
" and all the people of this nation were con-
" cluded thereby, altho' the conſent and concur-
" rence of the Houſe of Peers be not had there-
" unto."

A juſter notion of the power of the Houſe of Commons, I will borrow from the words of that very Sir Edward Deering, whoſe early expulſion by the ſame Houſe of Commons, the writer of the *Conſiderations* has celebrated, and from one of thoſe ſpeeches of his, for publiſhing of which he was expelled, and diſabled according to *their* faſhion: From which, by the bye, we may judge if the ſpirit and temper of ſome of thoſe diſabling expulſions, which are quoted from that Parliament, as *authorities* and *precedents* to us at this day. In the debate on the declaration for reformation in certain articles of religion, in which the lords refuſed to concur, he thus expreſſed himſelf.—— " The intent of your order to me ſeems doubt-
" ful, and therefore I am bold, for my own in-
" ſtruction to propound two queries. 1ſt, *How far*
" *an order of this Houſe is binding ?*" —— ——
" Your orders (I am out of doubt) are powerful,
" if they be grounded upon the *Laws of the*
" *Land.* Upon that warrant we may by an or-
" der inforce any thing that is undoubtedly ſo
" grounded; and by the ſame rule, we may abro-
" gate whatſoever is introduced contrary to the
" *undoubted foundation* of our Laws. But, Sir,
" this order is of *another nature*, another temper,

eſpeci-

" eſpecially in one part of it, of which in particu-
" lar at ſome other time. Sir, there want not
" ſome abroad, men of birth, quality and for-
" tune, ſuch as know the ſtrength of our votes
" here, as well as ſome of us (I ſpeak my own in-
" firmities) men of the beſt worth, and of good
" aſſiſtance in us, and no way obnoxious to us.
" They know they ſent us hither as their TRUS-
" TEES *to make and unmake Laws:* They know
" they did not ſend us hither to rule and govern
" them by *arbitrary, revocable* and *diſputable or-*
" *ders*, eſpecially in religion. No time is fit for
" that, and this time as unfit as any. I deſire
" to be inſtructed herein."

I am happy ſuch a ſpeech has been preſerved—the ſpeech of a Member of Parliament, expelled and diſabled by a Houſe of Commons, but ſuch a Houſe as never was before nor ſince, and I truſt will never be again; without father, without mother, without deſcent. I love to ſpeak in the language of paſt times, and am much better pleaſed to uſe the words of good men, who have borne teſtimony for the conſtitution in bad times, than to call in Kings, who have wounded and oppreſſed it: Though that character renders *their* witneſs unexceptionable when it is in favour of Law and Liberty. For which reaſon I ſcruple not, once more upon this head, to avail myſelf of a royal Speech found in the Mouth of Charles the IId. whom I ſhould wrong much, or rather ſhould injure the conſtitution more, if I cited him as a patron or friend of it. That Prince who, as a King, did not deſerve better, and as a man deſerved much worſe than his beheaded Father, from whom he was more diſtinguiſhed by his levity, lewdneſs and better fortune, than by the virtue of ſincerity; he too, was ſometimes adviſed, whatever he meant, to ſpeak a little of the truth to his Parliament,

Parliament, and with the Speech in which he opened that held in Oxford in 1680-1, he gives them a piece of council, in doing which, I make no doubt, he ſpoke more for his own ſake, than either for his Parliament's or his peoples. "I "conclude (ſaid he) with one advice to you, that "the rules and meaſures of all your *votes*, may be "the *known eſtabliſhed Laws of the Land*, which "neither *can*, nor *ought to be* departed from, nor "*changed*, but by *Act of Parliament*: And I may, "(added he) the more reaſonably require that you "make the *Laws of the Land* your rule, becauſe "I am reſolved they ſhall be mine."

In what has been ſaid, I hope I ſhall not be accuſed of ſetting the Law of Parliament and the Law of the Land to loggerheads; or of exalting the one in order to put down the other. I intended nothing leſs; and if I miſtake not, neither my argument, nor my authorities required that theſe two ſhould be at ſtrife with one another. It is my opinion I found them, and I imagine I have left them in perfect harmony together, mutually ſuſtaining and ſupporting each other. And from the view that has been given of their natural relation and connection, the Reader may, I flatter myſelf, diſcover whether the Law of Parliament, as it has been explained and illuſtrated by examples, either *alone*, (which is the way it is ſtated on the other ſide) or *conjointly* with the Law of the Land (in which view I have choſen, and the conſtitution, I think, warrants us to conſider it) does authorize the power contended for in the Houſe of Commons.

The gentlemen have told us, the Law of Parliament is part of the Law of the Land. But for that very reaſon, it muſt be conſiſtent with, and not deſtructive of it: For the ſymmetry of this beautiful conſtitution does not admit of parts ſo

ill

ill matched, or ſo ill put together, as to have them cutting one another's throats. The truth is, the gentlemen themſelves ſeparate and ſet at odds the two, which cannot be a true repreſentation of either, though they were neceſſitated by their argument, to give it as the beſt they had to offer. They raiſe up the Law of Parliament to depreſs the Law of the Land. They make of it, a thing that overtops and tramples upon the other; very ſuitable to that ſtile of *myſtery* into which they have metamorphoſed it. The Law of Parliament overſhadows the Law of the Land, and like one of the *arbores gravis umbræ*, with an unbenign umbrage, enervates and cauſes it to languiſh. But while we are preſent with the Law of Parliament, we are not abſent from the Law of the Land. Both theſe luminaries adorn the hemiſphere of liberty, and unleſs the ſyſtem is *convulſed* by the violence of *domination*, they will not eclipſe one another. If they do, darkneſs and confuſion muſt reign where their kindly rays, each moving in its own proper orbit, ſhould enlighten and chear, guide and direct.

After all, I am aware it will be ſaid, I have forgot one part of the Law of Parliament, the determinations of the Houſe of Commons, which, as our Authors argue, being the deciſions of a Court of competent juriſdiction ſubject to no appeal, make Law, and conſtitute, or at leaſt fix and aſcertain what is the Law of Parliament, and the powers appertaining to the Houſe of Commons by that Law: And I ſhall be told I have recognized as part of the Law of Parliament, the *conſtant uſage and cuſtom of Parliament*, upon which the Commons grounded the claim to one fundamental right which I have acknowledged to be juſt, and I have alſo cited for *conſtitutional* doctrine the words of King Charles I. wherein he acknowledges, that whatſoever privileges the Houſe of Commons enjoyed by *cuſtom, or uncontrouled, or*

lawful precedent, ought to be carefully preſerved. Upon which ground, I have alſo ventured to give it as my own opinion, that the power of expulſion is ſo eſtabliſhed by uſage, cuſtom and uncontrouled precedents, as to have become a part of the Law of Parliament.

It is all true, and I retreat nothing I have ſaid. Here, alſo, I am ready to join iſſue with the gentlemen on the other ſide, and therefore ſhall now proceed, to the

Fourth, and laſt ground, upon which it was propoſed to try the ſecond branch of the queſtion, and which, as I ſaid, is properly a branch of the laſt ground, but, as I intimated, I choſe to mention it by itſelf, becauſe of the importance it would be thought to be of, namely, "the precedents of general reſolutions and determinations of the Houſe of Commons, which have been acted, as ſufficient to eſtabliſh a power or authority in the houſe, by their own reſolution ſingly, to adjudge perſons to be ineligible, or to diſqualify them to ſerve as Members of Parliament."

This brings directly to the conſideration of the different claſſes (of which both the Author of the *Caſe* and the Writer of the *Conſiderations* have given us each a liſt) of perſons whom the Houſe of Commons have reſolved and adjudicated to be *not eligible* or *diſqualified*.

The poſition of the Author of the *Caſe*, is, "that it is by their *reſolutions only*, that perſons of "various claſſes are at this day diſqualified;" in proof of which he offers his liſt: And the propoſition is plain and explicit enough to mean, that there is no *Law*, other than that *made* by the *reſolution* by which the perſons of thoſe claſſes are diſqualified. The Writer of the *Conſiderations*, is ſomewhat more ambiguous in this article. He is to ſhow, (as he expreſſes himſelf in his 8th page) "that the Houſe of Commons have at all times,

"without

" without objection or controul, exerciſed this " juriſdiction of declaring by their own reſolution " *ſingly*, and without an Act of Parliament, what " the Law is as to the eligibility or diſqualification " of Members to ſerve in Parliament."

But, notwithſtanding the ambiguity of theſe words, there is, in reality, no difference betwixt this Writer and the Author of the *Caſe*. And I muſt beg it may be remembered, that (as has been made abundantly evident) however, the Writer of the *Conſiderations* in ſome places expreſſes himſelf, he in the whole ſcope and tenour of his argument, means by the Houſe of Commons *declaring what the Law is*, their *making the Law* themſelves: And if he did not mean this, there would be no ſenſe at all in his reaſoning. As to his words juſt now quoted, they are, whether deſignedly or not, inaccurate in the higheſt degree. For it muſt indeed be a very confuſed head, that would think of calling for an Act of Parliament to enable the Houſe of Commons, or any other Court of competent juriſdiction, to declare what the Law is, in a caſe legally brought before them. It is inherent in the very juriſdiction ſuppoſed, that they can do this without any Act of Parliament.

But then (and it is here this Writer and we part;) the Houſe can only declare that to be Law, which is ſo by force of an Act of Parliament, or of ſome other equal authority, ſuch as the Common Law is. In order therefore not to be miſled by this *Aurora Borealis*, inſtead of minding the Writer's looſe and deſultory manner of expreſſion, by which he puzzles his Reader, and I am apt to think confounded himſelf, we muſt nicely attend to the point he has under taken to prove, which will appear perfectly to agree with the poſition of the Author of the *Caſe*. *That* is laid down ſomewhat more clearly and explicitly in the 5th page of the

Conſiderations, as the ſecond head of enquiry, viz. in theſe words, " If they (the Houſe of Com-" mons) had a competent and excluſive juriſdicti-" on to determine the queſtion, (meaning the " queſtion lately decided upon) yet, whether " they are authorized by the Law and Uſage of " Parliament, to declare by their own reſolution, " any perſon incapable of being elected who is not " incapacitated by Act of Parliament?" Where, if the Writer had, inſtead of the words *by Act of Parliament*, ſaid in general, *by Law*; or if he had added to his own words theſe others—*or is not incapacitated by the Law of the Land*; the real queſtion he had to conſider would have been fairly and compleatly ſtated. And I beg leave to ſay, without ſuch an alteration, it neither is fairly ſtated, nor can be juſtly argued upon: For an Act of Parliament is not the *only* Law of the Land, and therefore not the only thing by which a perſon can be incapacitated to ſerve as a Member of Parliament.

The reaſon why the Writer of the *Conſiderations* would not compleat the queſtion, by the addition with which I have ſupplied his imperfect ſtate of it, will be very obvious, when we come to the claſſes themſelves; becauſe upon this *little* trivial circumſtance of the authority of the Law of the Land, all the claſſes that either he or the Author of the *Caſe* have cited, moſt clearly hinge, and the determinations thereupon are fully ſupported and juſtified, as we ſhall preſently go on to ſhow.

Two general obſervations, however, I muſt premiſe, before entering upon the Caſes; and it is only to recall the attention to the ſtate of the gentlemens argument. Both of them for ever confound the authority upon which the Houſe of Commons act as judges, or, in other words, the ſource and foundation of their excluſive juriſdiction, with the rule by which they are bound to determine.

termine. The *Law of Parliament* may be ſaid to be the *former*, but *Law in general*, or the *Law of the Land* is the *latter*. So the gentlemen, and particularly the writer of the *Conſiderations*, in ſpeaking of their diſqualified claſſes, adopt this ſort of expreſſion. " The Houſe determined " what is the *Law of Parliament*, or determined " that this was ſo by the *Law of Parliament*." But whoever takes the trouble to look into the Journals, will find no ſuch terms uſed there. In the debates upon caſes of incapacity, the phraſe uſed by the Parliament men is, " This is, or " is not warranted *by Law*, or by the *common* " *Law*:" Of which, inſtances have been mentioned as we went along. An attention to this real diſtinction, but obvious confuſion in the reaſoning of both theſe Authors, will be neceſſary in the ſequel.

The other preliminary obſervation is this: Though I am myſelf ſatisfied all the claſſes of diſqualifications cited by theſe authors, are capable of being reduced to the Law of the Land, and will be found to be grounded upon it; yet the gentlemen muſt not underſtand it to be neceſſary to our argument, or a thing we are bound to undertake to juſtify by ſufficient grounds in Law, all the determinations in the Houſe of Commons with regard to diſqualifications, or any other ſubject whatever. The laſt indeed were a taſk not to be undertaken by any body. But what we aſſert, and are warranted to maintain, is this, That whether the Houſe determined juſtly and according to Law or not, the *Law* was the only ground they pretended to go upon in their determinations: We mean the Law *in general*, and not what theſe Authors are pleaſed to call the *Law of Parliament*, to which they confine every thing. We affirm the *rule* of determination always was

ſuppoſed

ſuppoſed to be *a Law in being*, antecedent, and external to the Houſe of Commons, and to their own *ſingle* authority; and that they did not pretend merely to *reſolve* incapacities, or to make or declare them ſingly, by force of their reſolutions, without, and independent of Law.

Theſe obſervations premiſed, we ſhall take the claſſes in the order in which they are mentioned by the Writer of the *Conſiderations*. And his firſt claſs is, *Aliens*, which the Author of the *Caſe* alſo cites, but ſays no more of it than this, That it was reſolved, the election of Mr. Walter Stewart, being no natural born ſubject, was void.

To ſpeak properly, and according to the diſtinctions we took in a preceding part of theſe papers, this is a caſe of *want of capacity*, rather than of incapacity. For an Alien, is by ſtate and condition, civilly incapable of any ſhare in the peculiar privileges of the community, not having a civil relation to it. An Alien, if I may be pardoned ſuch an expreſſion, has no conſtitutional blood in him.

The Writer of the *Conſiderations* firſt mentions the queſtion which aroſe after the acceſſion of King James the Iſt. Whether Aliens were eligible, and a doubt then made, if even Scotchmen naturalized, could be admitted to ſit in Parliament? But making a leap from that ſubject, he proceeds to tell us, "That in the debate on the queſtion, whether "a Scotch Peer could ſit in the Engliſh Houſe of "Commons, in one of the moſt able and moſt "conſtitutional Parliaments that ever ſat, no man "ever doubted the right of the Houſe of Commons, to determine what the Law was, tho' "no Act of Parliament exiſted on the ſubject."

It muſt, indeed, have been a very unable Parliament, and very ignorant of the conſtitution, which could have dream'd of an Act of the Parliament

ment of England, exiſting with regard to Scotchmen, who were not ſubjects of the crown of England, their ſitting in the Engliſh Houſe of Commons, before the union of the two crowns. I ſhould ſuſpect, when the Writer of the *Conſiderations* compoſed this paragraph, he was looking upon an Act of Parliament, alluded to in his work, made in the end of Charles the IId's reign, for excluding Papiſts, which, by what blunder, I know not, very abſurdly binds the Peers of Scotland, to take the oaths thereby enacted.

After the union of the crowns, when any queſtion occurred about the capacity of Scotchmen to ſit in the Engliſh Houſe of Commons, none but a very unlearned man could doubt of the right of the Houſe of Commons, to determine what the Law was. But ſtill, they could then, as well as now, only determine what the Law in being was, they could not legally make a Law by their reſolution; and *tho' no Act of Parliament exiſted on the ſubject*, the whole Parliament could never have been ſo unread, as not to know, that by the Law of England, and indeed by the Law of Nations, one that was not the liege ſubject of the crown of England, was incapable of the higheſt truſt and privilege a ſubject could hold or enjoy in the kingdom.

The Writer of the *Conſiderations*, on mentioning the particular determination cited by the Author of *the Caſe*, by which a Scotchman, *ante natus*, was excluded from the Houſe of Commons, reaſons thus; " It is not, ſays he, a ſufficient anſwer, to " ſay, this is the Law of the Land: Aliens are diſ- " abled by the Law of the Land." And with ſome air of exultation, rather too haſty, he " begs to " know from whence *they* collect this to be the " Law, but from the reſolutions of the Houſe of " Commons?" Adding, " it will appear from

" the

" the next head, that diſabilities created by the " Common Law, and by Law of Parliament, are " not always co-extenſive." To which he ſubjoins theſe other un-anſwerable queſtions, " What " entitled Scotchmen *poſt nati*, to be eligible into " the Houſe of Commons before the union ?" (I ſuppoſe he means the union of the crowns, tho' the ſingle word is now generally uſed to expreſs the union of the kingdoms) " Was it by Act of " Parliament ? if not, by whom, and on what " foundation was the Law ſo declared ?"

If I may number myſelf among the *they* alluded to in the firſt of thoſe queſtions, I ſhall freely anſwer, it would never have entered into my mind to *collect* any thing whatever to be Law, from mere reſolutions of the Houſe of Commons *as ſuch*; and, at preſent, I am ſatisfied, and hope I have ſaid enough to ſhow, that all diſabilities are created by Law, and therefore, that there can be no difference as to their co-extenſiveneſs.

But with regard to the other puzzling queſtions propoſed by this Writer, I will anſwer them only by aſking him ſome. Did the gentleman never hear of the famous judgment as to the *poſt nati* in *Calvin*'s caſe, as it is called, by which it was, upon the opinion of the judges of England, in the Exchequer-Chamber, reſolved *to be Law*, that a Scotchman, born after the union of the two crowns, being born within the allegiance of the King of England, was, by his birth, naturalized ? I am not now going to diſcuſs the merits of that judgment, or the part King James took in it, upon which I have ſomewhere read this ſatyr, " That ſuch power is in the breath of Kings, " and ſuch ſoft ſtuff Judges made of, and that " Lord Chief Juſtice Coke, by whom the judg- " ment was reported, was fit metal for any ſtamp- " royal." It is ſufficient for me to ſay, this was a judgment

judgment of the competent jurisdiction (which this gentleman say makes Law, and I only argue is the proper way of trying what the Law is, and applying it) and therefore the Law was to be collected elsewhere, than from the resolutions of the House of Commons.

I might also ask the Writer of the *Considerations*, if, supposing him to be a stranger to the Courts of Common-Law, his parliamentary knowledge has not yet reached to two great cases, adjudged in Parliament within these very few years, in which it was decided upon the Common-Law, that Persons born without the allegiance of the crown, not the children of natural born subjects (who are excepted by Act of Parliament) are, in respect of their *state*, and by the fundamental principles of Law, as having no natural allegiance to the country, incapable to take, by purchase or inheritance, lands in England; yet *there never existed an Act of Parliament upon the subject?* But surely he does know the Act of Succession, which excludes foreigners even *naturalized*, from sitting in Parliament, which supposed that before that Law, a person naturalized could sit, as in fact they did; and one noble Earl yet remains in possession of a seat in Parliament, by the capacity derived from, and enjoyed under the former state of the Law. He likewise must know from the Statute-Book, as well as the Journals, that Acts of Parliament have been made to remedy difficulties in succession, to which natural born subjects were liable from defect of inheritable blood in their ancestors and relations, who were foreigners.

If the Writer were a learned man, he would know from the books upon the Publick Law, that the Law of England, in this respect, is but conformable to the Laws of all other civilized nations, which have no particular constitutions to the contrary.

trary. And, upon the whole, I think it may be concluded, that the incapacity of Aliens to ſit in Parliament, is an incapacity by the *known Law of the Land*; and that when the Houſe of Commons adjudged Aliens to be incapable, they only determined *according to Law*, and did not, by their *reſolution ſingly* without a Law, make a Law of incapacity by their own authority, or adjudge a perſon to be ineligible who was not *incapable by Law*.

The next claſs is that of *Minors*, which the Author of the *Caſe* is wiſe enough not to mention, and had probably too much Law to meddle with: And indeed to enlarge upon this caſe, unleſs to prevent this Writer from ſaying he is not anſwered, would really, methinks, be to inſult the loweſt underſtanding; for this is a *natural* incapacity, founded in nature. If a *Minor*, and a *Major*, or one of full age, are, as they certainly are, contradictory terms; it is a contradiction in terms, to ſay that a Minor may *be*, or may *do* what a Major *only* is capable of being or doing. In what country under the Sun, where there is any Law at all, is not minority an incapacity in civil life? The Laws of particular countries only fix the term of minority: And Scripture itſelf, ſpeaking according to the Law of Reaſon, tells us, the heir, while a child, is under tutors and governors until the time appointed.

The gentleman ſays, "We all know that 'till the "Act of the 7th and 8th of William IIId, the prac"tice of Minors ſitting in Parliament univerſally "took place." I wonder how many Minors this Writer knows, or thinks every body knows, to have ever ſat in Parliament; for he ſpeaks of a caſe that muſt have been very *un*common, as if it had always exiſted, and every day occurred. Yet he has produced but one preciſe deciſion on the point; and however often it may have happened,

and been overlooked, the Law was not thereby hurt or altered.

The incapacity of minority does not ſtand only upon the opinion of ſome great lawyers, as this Writer would ſeem to inſinuate. Every lawyer has ſaid it: Every law-book contains it; and there never was a Minor who did not know it to be the Law. Let our Author but look to Lord Coke's treatiſe on Parliament, he will there ſee, it is numbered among the tranſcendent powers of it's juriſdiction, that it can, by an Act of Parliament, adjudge an infant or minor to be of full age, as he alſo ſays it is to make a mere Alien a ſubject born.

The reaſon of ever propoſing or paſſing a clauſe in an Act of Parliament on this head, ſuch as is in the ſtatute of the 7th and 8th of King William, could only be, as is often done, to confirm and render effectual the Common Law, by inflicting ſevere penalties, which the clauſe does; and alſo to make an end of that abuſe of the Houſe of Commons, by determinations of theirs, in particular caſes, granting in effect, to Minors, the *veniam ætatis*, as to ſitting in Parliament, which was flagrantly againſt Law. But to argue as this Writer does, from ſuch a clauſe in a ſtatute, that, before that Act, Minors were not incapable by *Law*, is no better reaſoning, than if the Author wrote to endeavour to perſuade us, that polygamy was the Law of this country, when the bill was paſſed in James Iſt's reign, to reſtrain perſons from marrying again, while their huſbands or wives were alive.

When the gentleman cites the ſingle determination, by which a perſon, acknowledged to be a Minor, was declared duly elected, let him compare that with other caſes, alſo quoted, for a different purpoſe, adjudging that a perſon voted for by a *minority* was duly elected, when the majority

gave their votes to one under a *legal incapacity*. Does he think a determination allowing a perſon attainted to be duly elected would be good Law, or Law of Parliament? But I ſhall only aſk him, if the deciſion he cites *for* the Minor, is the only arbitrary, abſurd determination any Houſe of Commons ever made? *We have all* heard, ſince our Author will ſpeak in the name of *all*, of their voting a Church out of a town at one time, and voting it into the town the next, for Election purpoſes.

As to all ſuch determinations, the lines applied by Lord Coke to an Act of Parliament paſſed to attaint a ſubject of High Treaſon, without regard to that eſſential Law of natural juſtice to hear him, are the only proper anſwer,—*auferat oblivio ſi poteſt; ſi non utcunque ſilentium tegat!*

Inſtead therefore of "its appearing (as our Author ſays,) from this ſingle determination, that "diſabilities by the Common Law, do not always "operate as ſuch by the Law of Parliament, "and that of this difference, the Houſe of Com- "mons are the ſole Judges, and that in caſes, "however unfit and inconvenient, the Law, as "they have declared it, cannot be altered but by "Act of Parliament." Inſtead of this, I ſay, it in truth only appears, which is no new diſcovery, that in ſome *paſt* times, the Houſe of Commons has arbitrarily ſhaked itſelf looſe of the incumbrance of all Law whatever, and perhaps ſometimes of all reaſon with it. But the difference ſuggeſted by our Author, between the operation of diſabilities by the Common Law, and the Law of Parliament exiſts no where but in his imagination: And this doctrine that the Law, as declared by the Houſe of Commons, cannot be altered but by Act of Parliament, is ſo far from being true, that the Houſe itſelf, by the variation of their deciſions,

till

till reſtrained in that article by Act of Parliament, has contradicted it in hundreds of inſtances. In itſelf the doctrine is too groſs to be ſwallowed by any one who knows the leaſt of the Conſtitution, or of the Law, or the powers of the Houſe of Commons.

The Writer of the *Conſiderations*, for his third claſs, ſays, "The next deſcription of perſons diſ-"abled to ſit in Parliament *by Law*, are the *Cler-*"*gy*." And this claſs is barely mentioned by the Author of the *Caſe*, with a reference to the reſolutions of the Houſe. But if the Clergy are, as the Writer of the Conſiderations ſtates it himſelf, *diſabled by Law*, the caſe has nothing to do with the argument: And it is clear the Houſe did not, in excluding the Clergy, make a Law ſingly by their own reſolution: They only declared what the Law was, and determined *according to Law*. There is no doubt of it, that this alſo is an incapacity by the common Law; or we cannot from books or authorities, or uſage and cuſtom, know any thing to be the common Law, no not that an eldeſt ſon is an heir.

The fact is, the Clergy had their own Parliament or convocation which was part of the conſtitution of the Kingdom, called by the King's writ, in which the Clergy were all preſent in perſon or by repreſentation, and taxed themſelves, and the Members enjoyed the like perſonal privileges as the Members of Parliament: They could not be Members of the Houſe of Commons, the great foundation of whoſe conſtitution and power, is the right of taxing the people, which did not extend to the Clergy. And though the right of taxing by the convocation was given up in Charles the IId's reign, which has made convocations of leſs conſequence ſince; yet the convocation itſelf ſtill ſubſiſts: And no inſtance is alledged of an election of a Cler-

a Clergyman as a Member of Parliament, ſince the change was made as to the power of taxing in the convocation. The laſt reſolution cited on a claim of that ſort is in 1661, and it was not till 1665 that the Clergy gave up their right of taxing themſelves: Before which it was manifeſtly abſurd and againſt the conſtitution, for Clergy to pretend to ſit in the Houſe of Commons.

So Lord Coke gives as the reaſon of the incapacity of Clergymen (of which he ſpeaks as he does of that of Minors and Aliens, without the ſurmiſe of a doubt, thus; "becauſe they are of "another body, viz. of the convocation." And he only takes it from the reſolutions of the Houſe of Commons. The words, as quoted in the *Caſe* are, "that Alexander Newale, being a Preben-"dary of Weſtminſter, and thereby having a voice "in the convocation, *cannot* be a Member of this "Houſe."—Which evidently imply the cauſe of excluſion to be founded in the common Law and conſtitution of the Kingdom: And ſhew it was not an incapacity merely by an arbitrary reſolution of the Houſe of Commons.

Our Author might have ſpared himſelf the trouble of his remark, "that *under theſe deciſions of* "*the Law of Parliament*, (as he calls the reſolutions in particular caſes as to Clergymen) "with-"out an Act of Parliament, the Clergy have ac-"quieſced." In truth they have acquieſced only in the *Law of the Land:* And our Author ſpoke more properly than he does in this ſentence, when he ſet out with ſaying, as above obſerved, that the Clergy were *diſabled by Law*, inſtead of being diſabled by, what he here calls, *deciſions of the Law of Parliament*; a term I do not well underſtand.

If it were neceſſary on this head to add to clear authority, one affecting to reduce things to their firſt principles

principles might, without extravagance, ſay, there ſeems to lie ſomething very like, or near akin to a *natural* incapacity upon the inferior Clergy, who, by their temporal poſſeſſions bear no ſuch immediate relation to the Crown, or to the conſtitution of Parliament, as the Lords Spiritual have their antient Baronies, which is underſtood to be the foundation of their ſeat in the Houſe of Lords. It is an incapacity founded in the nature and reaſon of things, which is the firſt and higheſt of all legal incapacities. The ſubordinate Clergy, by the *indelible* character with which they are cloathed, are ſuppoſed to be *neceſſarily* and *perpetually* employed in another vocation, in ſuch a manner, that they cannot do the duty of a Member of Parliament. They are by office, and by oath engaged in the ſervice of another maſter, whoſe claims are paramount to all others, in virtue of the unalterable vow, by which they have lawfully devoted themſelves to his work. They live at the altar, and ought to ſerve there; that being the duty even of their civil relation to the ſtate, in the ſphere in which they have inrolled themſelves of free conſent, and from which they cannot, by an act of their own, be diſcharged. It is to ſuch a natural incapacity or *repugnancy*, that the alluſion, I apprehend is, when it is ſaid in the courſe of the debate as to the Attorney General in 12mo. Jac. 1ſt—"that never any Maſter of the "Rolls was of the Houſe 'till 26 H. 8th, be"cauſe, before, all Maſters of the Rolls, 'till "then, were in *holy orders*, and ſo could not be "of the Houſe."

The fourth claſs mentioned in the *Conſiderations*, but not taken any notice of in the *Caſe*, is that of *Ambaſſadors*. But the ſlighteſt attention will ſatisfy any one, that this caſe is totally foreign to the Writer's own purpoſe, not ſingly, becauſe the Houſe

Houſe of Commons have never reſolved perſons of this character to be *diſabled*, which makes the reſolution upon the head, no authority to the point in hand; but becauſe there never could be a colour for pretending it to be an *incapacity* or *diſability*: And as for its being, as the Writer of the *Conſiderations* ſays, a precedent for the right of the Houſe of Commons *to judge and determine* upon all diſqualifications and incapacities, we require no authority to this purpoſe, becauſe we agree it to be of their competent, inherent, and excluſive juriſdiction.

In the firſt place, with regard to ambaſſadors choſen or ſitting in Parliament, they are neceſſarily ſuppoſed to be poſſeſſed of the legal *capacity* of elegibility; and that they are not by any Law, or any Act of the Law, diſabled or incapacitated. The utmoſt that can be ſaid, is, that from their preſent ſituation it is impoſſible they can attend their ſervice in Parliament. And on the other ſide, the impoſſibility is at beſt but temporary and uncertain, as their employments may laſt for a month, a ſeſſion, or a year; or not ſo long as either. There could, therefore, be no pretence for declaring them *incapable* of ſitting even in a *preſent* Parliament. And if the Houſe of Commons had ever reſolved, that the office of Ambaſſador, deprived a Member of his ſeat, it muſt have been by ſome form or mode of ſentence not yet known, as expulſion would have been a moſt incongruous one; and the method of iſſuing a new writ, as in the caſe of accepting an office, which now by ſpecial ſtatute vacates a Member's ſeat, is founded on the ſtatute, and applicable only where it operates.

But the argument may be very ſhort on this point. As there is nothing in the Common Law that inſinuates this to be an incapacity; ſo the reaſon

reaſon of the thing manifeſts, it never could be conſtrued as ſuch. And this ſufficiently appears from the old general reſolution of the Houſe of Commons in 1585, againſt amoving (as it is called) Ambaſſadors; For it is not confined to *their* caſe, but with them are joined in the reſolution, perſons *in Execution*, or viſited by *Sickneſs*; as to whom we ſee, anciently, queſtions had been ſtirred, which, to make an end of all doubt, produced at length that general reſolution, moſt conſonantly to reaſon, declaring that perſons in any of theſe ſituations, ſhould not in any wiſe be removed from their place, nor any other elected in their ſtead; the reaſon of which tells itſelf, that the ſituation of Ambaſſadors, and theſe other perſons, was but a *temporary* interruption to the duty of Parliament.

At the ſame time, I apprehend there can be no doubt but the Houſe of Commons has, by the Law of its conſtitution, an inherent power (which therefore is, and muſt be according to the Laws of Parliament;) to enforce and ſecure the attendance of its own Members for the ſake of the *publick*, as well as for the intereſt of the particular conſtituents: And conſequently, if any member were unreaſonably, and without juſt excuſe, to abſent himſelf from Parliament, it would be a good ground of expulſion, in order to let the electors into a new choice.

Nay, the pretence of the King's ſervice might not, under all circumſtances, be deemed a ſufficient reaſon to preſerve a *non-attending* Member in poſſeſſion of a ſeat, for a length of time inconſiſtent with the ends of repreſentation, and the duty every member owes to his conſtituents, and to the whole community. So upon the 23d of March, 1623, "Mr. Chub, Burgeſs for Dorcheſter, having writ-"ten a letter to the Speaker, deſiring to be ex-"cuſed his attendance at the Parliament, for that

" he was employed in his Majeſty's ſpecial ſervice,
" Mr. Speaker moved to underſtand the opinion
" of the Houſe; *which was clear that he ought*
" *not to be excuſed:* Yet the caſe was further refer-
" red to the examination of the General Commit-
" tees for *Returns* and Privileges."

Upon ſuch a ground as this, however, only could the thought of turning Ambaſſadors out of the Houſe ever have been entertained. And, on the other hand, it muſt occur without being ſuggeſted, that as Ambaſſadors are abſent, and only occaſionally ſo, on the publick ſervice, the cauſe of their abſence, if not of ſuch continuance as to be abſolutely incompatible with the truſt of their conſtituents, muſt be a good excuſe, as they are doing the duty of their allegiance in that character and ſtation, which, for a time, ſuſpends their attendance on Parliament. It is ſuperfluous, therefore, to add, what any one, who has dipped into the Publick Law, knows from the municipal conſtitutions of antient ſtates, the moſt famed for their civil policy, that thoſe who were abſent *reipublicæ cauſâ*, inſtead of loſing any right or privilege they had, were favoured, on account of the ſervice they were engaged in abroad, with extraordinary immunities at home.

The concluſion is, that this wiſe and conſtitutional determination (as the Writer of the *Conſiderations* properly enough calls it) by which the Houſe of Commons declared Ambaſſadors not to be incapacitated, was as much a deciſion within the bounds of Law, and agreeable to the Law of the Land, as any one by which they ever adjudged perſons of any particular claſs to be ineligible. It is founded on the principles of the conſtitution, and the rules of the publick Law. Nor have the grounds of the determination any particular relation to, or dependance upon the Law of Parliament;

ment; to which the Writer of the *Conſiderations* would obliquely refer it, when he cloſes this article with ſaying, "it appears from the ancient de-"bates among men of the greateſt parliamentary "abilities, that, at that time, no man ever dream-"ed that the Houſe of Commons had not a right "to determine what the Law of Parliament was, "though no Act of Parliament had ever been "made on the ſubject."

This is only one of the uſual deflections in the reaſoning of this Writer; for, in the preceding article, and in other places, he ſpeaks of determining what the Law, in *general*, was. But by oppoſing the Law of Parliament to an Act of Parliament, as he does in this place, he means (and it is his conſtant aim,) to hide all other Law but theſe two, thereby to reduce every incapacity, not created by Statute, to the Law of Parliament; of which the only idea he is willing we ſhould entertain, is that of a Reſolution of the Houſe of Commons.

The fifth claſs, and which is alſo mentioned by both the authors, is that of Sheriffs and Returning Officers. All that the Writer of the *Conſiderations* pretends to obſerve upon it in the way of argument is, that whenever the queſtion, "as to the "eligibility of the perſons of this claſs has oc-"curred, the Houſe of Commons have been con-"ſidered as the only Court having a right to de-"termine *the Law*." In anſwer to which, we can only repeat what has been ſo often neceſſary to be ſaid, that this makes no ſort of application of the authority alledged to the queſtion really in debate; which is not, Whether the Houſe of Commons has the right to determine the Law; but if, under colour of determining, they can by their Reſolution make the Law inſtead of purſuing it?

We apprehend the determinations, as to this claſs, do, as little as any other that is cited, prove

 that

that it is the Reſolution of the Houſe which makes the Law, or conſtitutes the incapacity. On the contrary, it appears to us, that the Law of the Land is the ground of the determination. One thing is certain, that in all the debates on the ſubject, *the Law*, and not the power, or authority of the Houſe of Commons, is on all hands appealed to, as the teſt for trying the objection; and the power of the Houſe to exclude by a mere reſolution, is never once mentioned, though that would always have been the ſhorteſt road to an end of the debate. It is remarkable even, that in the debates upon other queſtions of incapacity, particularly with regard to the Attorney General; *Sheriffs*, and *Perſons in Holy Orders*, are ſet up for illuſtration and proof of the Law, as analogous and parallel examples of excluſions *by Law*. The language in the Houſe on that occaſion was this, "None to be "excepted *by Law*, but Sheriffs, in Orders, and "Judges."

The caſe of Sheriffs, and other Returning Officers, differs from any of the foregoing; it is neither a caſe of *incapacity*, nor *want of capacity*, but rather a defect of the means of a legal return, or a want of the means of a legal election, ariſing from a caſual ſituation by office, which renders it impoſſible for perſons of that character and deſcription to be duly elected; becauſe they are the judges of the election; or to be duly returned, becauſe they are themſelves the Returning Officers, and according to the notions of Law, which in this very inſtance are alſo founded in natural reaſon, cannot return themſelves.

That it is not an ineligibility, which is the ground of the objection, and the foundation of the determination upon it, is clear from this, that Mayors, and other Returning Officers in Boroughs, might be elected, returned, and ſit for any other place, except

cept that of which they actually were the Returning Officers at the time of the election; and it is an adjudged caſe, that the ſeat of a member of Parliament was not vacated either by his being choſen a Mayor, or appointed Sheriff of a county. "20th January, 1628, A motion was made that "Mr. Lynn being choſen Mayor of Exeter, "might be diſcharged, and a new choſen; but "ruled, that being a member of the Houſe be-"fore he was elected Mayor, he ought to ſerve." The ſame was reſolved 25th January 1605, as to Sir Jo. Peyton returned for Cambridgeſhire, and afterwards appointed a Sheriff; which ſhews that neither a Sheriff, nor a Mayor, is ineligible, or incapable of ſitting in Parliament, on account of being actually in office.

It is acknowledged, that Sheriffs are now legally choſen, even when they are in office, for any other place but the county of which they are Sheriffs; though that was anciently made a queſtion, becauſe of the clauſe in the writ prohibiting the Sheriff to return himſelf, or any other heriff. This, it is admitted, has become obſolete, and loſt its force, like the objection of *non-reſiancy*, and other things, which Lord Coke calls merely *directory*. But this laſt was not ſo clearly ſettled to be the Law at the time of Sir Edward Coke's caſe, in 1625, mentioned in the *Conſiderations*; when, however, the Houſe would not turn out Sir Edward, though they avoided an expreſs determination on the point; it having been determined the contrary way not many years before. Such a ſort of thing would the *Law of Parliament* be, if the contradictory deciſions of the Houſe of Commons conſtituted it.

The objection, therefore as has been ſaid, is merely to the *Election* itſelf, and to the *Return*. Or, to vary the expreſſion once more, it is to the poſſibility in this caſe of particular perſons being duly elected, and to the power of particular perſons

ſons to make a legal return. Which is plain from the terms of the reſolutions upon the head. "Reſolved, (June 2d, 1685,) that no Mayor *can* "*duly return himſelf* to ſerve in Parliament for "the ſame Borough of which he is Mayor at the "time of the election."

Reſolved, that no Mayor, Bailiff, or other Officer of a Borough, *who is the proper officer* to whom the precept ought to be directed, is capable of being Elected to ſerve in Parliament, for "*the* "*ſame Borough of which he is Mayor*, Bailiff, or "Officer, at the time of the election."

And, in the Caſes adjudged upon the ground of theſe general reſolutions in the ſame year, 1685, the writs are ordered to be iſſued "in the room "of (ſuch a one) who was Mayor of the ſaid "town, and was the *proper officer to whom the pre-* "*cept was directed, and who returned himſelf*." From all which it is evident, the objection is, in reality, not to the *Member* choſen, or to his capacity, but to the capacity of the *returning Officer*; which is as effectual to vitiate or void the return, as an incapacity in the perſon elected and returned, rendering him ſtrictly ineligible.

Thus much being ſaid to bring the objection to it's true level, I apprehend it is not very difficult to make it appear that this is an objection, call it incapacity or by what name you pleaſe, *of the Law*. I ſay it is an objection of the Law; and it is here the argument ought to meet the Caſe. It is an objection which owes it's origin and force to the *Law of the Land*, and *not* to the authority of Reſolutions of the Houſe of Commons: which laſt is the point the gentlemen have to prove, and in proof whereof they have alledged this claſs as an authority. The Houſe of Commons have only in this as in other caſes, by their Reſolutions and Determinations, applied and given effect to the objection which is built upon *Law*,

independant

independant of the Houſe of Commons, and a binding rule for their deciſions.

When I ſay the objection, and conſequently the determinations upon it, are founded upon the Law of the Land, I lay out of the caſe altogether the old and antiquated Act of Parliament, or ordinance as Lord Coke calls it, diſabling Sherriffs in 46 Edward 3d, mentioned in the *Conſiderations*, which would, if admitted as ſtatute authority for the incapacity, leave no room for the queſtion in debate, ſo far as it relates to Sheriffs. By thus putting them, and Mayors and other Returning Officers on the ſame footing, we at once anſwer this queſtion of the Writer of the *Conſiderations*, "What "do you ſay to the ſituaion of Mayors, Bailiffs, and "other Returning Officers, againſt whoſe eligibili-"ty there is no pretence of an Act of Parliament?"

It might, as to Sheriffs, be ſufficient to ſay, that the prohibition in the writ of election is part of the *common Law*, becauſe the writ itſelf is ſo, and cannot therefore be altered but by Act of Parliament. This is Lord Coke's doctrine, and he is a better authority than Pryn, who has diſputed the point with him, as he has done many others, in which his political opinions, made him to differ with Coke. If the writ is allowed to have the force of a writ of the common Law, it is indiſputable that it cannot be altered but by ſtatute, or by ſuch a preſcription as has rendered obſolete part of the writ, in the form in which it now ſtands. For this we need no other authority than the ſtatute book, by which we ſee, that an Act of Parliament was neceſſary to deſtroy ſuch a monſter as the writ, *de Hæretico comburendo*. And as that part of the writ of election, containing the prohibition of Sheriffs to return themſelves, continued after the ancient Act of Parliament made to ſecure the freedom of elections, in oppoſition

to

to the innovation made in the writ, by inſerting the abſurd prohibition to chooſe Lawyers, it is thereby the more ſtrongly confirmed, as a part of the common Law. This article having alſo *retained* it's force, when the other part of the writ, commanding not to return any other Sheriff, has confeſſedly became obſolete and of no effect, the confirmation is ſtill farther ſtrengthened.

With regard to Mayors, and other Returning Officers of boroughs, though the writ is not immediately directed to them, yet as the Sheriff's precept, which is their warrant, is only a mediate communication or tranſmiſſion of the command of the writ, it may be thought to carry with it the quality of the writ itſelf, it being conſidered as an incongruity that the writ ſhould, in it's conveyance, loſe any of it's virtue, or that the precept founded upon it, ſhould be broader than itſelf. In this way the reſtraint affecting the Sheriff as a Returning Officer, may be thought to go along to the Mayors, and other proper officers of the boroughs, acting in the ſame capacity. So the Law, and the Reſolutions of the Houſe of Commons, uniformly conſider Mayors, &c. as the Returning Officers, and in the Reſolutions, they are deſcribed as the perſons to whom the execution of the precept belongs, and they are on all occaſions treated and dealt with as the Returning Officers, in ſtatutes, and by the Houſe of Commons, and the Courts of Law. Upon this ground the Law is the ſame, as to the Sheriff, and all Mayors, and other Returning Officers of boroughs, though theſe act only in ſome reſpects ſubordinately under him.

But if there were no authority in the writ of election, as a part of the Common Law, the objection is founded upon the principles of reaſon and natural juſtice, which are acknowledged grounds of the Law of England. Returning officers

ficers are not merely *miniſterial*, but have a *judicial* part of the act in all elections. They judge of the votes, and, in the firſt inſtance, adjudicate the merits of the election, and by their return as a verdict, the ſeat is conferred. Now, if it be Law that no man can judge in his own cauſe, how can a Returning Officer return himſelf, that is, *judge* for himſelf. How can he judge between himſelf and other Candidates, or between himſelf, and the Electors. That is Common Law, it is the Law of Nature. An Act of Parliament to make a man judge in his own cauſe would be void. The Lord High Chancellor of England, rather than judge in his own cauſe, muſt devolve the juriſdiction of the Great Seal even upon the Houſe of Lords.

No other anſwer is neceſſary to what the Writer of the *Conſiderations* ſays, that by the Act of Henry the 6th, a Returning Officer muſt return himſelf, if he has the majority of votes. That ſuppoſes an ordinary courſe of things, and for further reply, *vide* the adjudication as to Colonel Lutterel's election.

Mr. Serjeant Harris, like a lawyer who gives the colour of his profeſſion to every thing, upon one of theſe occaſions, put the ground of the objection upon the very form of the Indenture of Return, "We know, (ſaid he,) a man cannot "make an Indenture to himſelf, no more can he "here between himſelf and the county, for there "are required two perſons."

But before diſmiſſing this article, I will make one obſervation, and chiefly becauſe it leads to a point of general doctrine. Returning Officers are the ſervants of the Houſe of Commons: And the Houſe, as having elections under their particular care, may make regulations that do not affect the eſſence of the election, but in the nature of Bye-Laws, with reſpect to the manner of proceeding

in an election. Of this ſort was the interpoſition of the Houſe pending the late election of Middleſex,

Nobody could find fault if the Houſe were to reſolve that the Serjeant at Arms attending the Houſe, as their ſervant, was incapable of being elected a Member, or that a Clerk of the Houſe of Lords, or the Gentleman Uſher of the Black-Rod could not ſit as a Member of the Houſe of Commons. *Compatibility* and *incompatibility*, the Law will take notice of, as well as of capacity and incapacity.

So in the 7th of James I. Mr. Bowyer, a Member, having been appointed Clerk of the Parliaments, he was removed; and the reaſon aſſigned in the Journals is, that by his oath he was bound to attend in the Upper Houſe, and was not to underſtand the ſecrets of the Houſe. An honourable gentleman, who now makes a great figure in Parliament, ſat long at the Clerks table in the Houſe of Commons, and, and I dare ſay, neither himſelf nor any body elſe, ever thought he could have procured himſelf to be returned a Member, and have continued in his office as Clerk, ſo as to riſe from the table when he thought fit, and take a ſhare in the debates, and then ſit down again to write his minutes. Yet he had all the while the ſtrict capacity of being eligible, as much as any other man in the kingdom. He changed his ſituation, and now ſits as a member, ſo much to his own credit, and the advantage of the publick. That is the difference between incompatibility and incapacity.

The Houſe has a peculiar juriſdiction, even over its own Members. I do not ſay it can deprive its Members of their common right, but it may reſtrain them as to rights, which interfere with their ſituation and duty as Members, either in point of attendance

attendance, or independence. Thus I apprehend it was a very legal reſolution which a virtuous Houſe of Commons came to, penetrated with a ſenſe of the evils of the long penſioned Parliament. After ordering the papers to be laid before the Houſe, which related to the Members thereof, who had received allowances out of the ſecret ſervice money, they reſolved 30th December, 1680, *nemine contradicente*, "That no Member "of this Houſe ſhall accept of any office, or "place of profit from the Crown, without the "leave of this Houſe, nor any promiſe of any "ſuch office, or place, during his being or conti-"nuing a Member of this Houſe." And,

"That all offenders herein be *expelled* this "Houſe."

In proof of Lord Coke's obſervation, that no good motion was ever made in Parliament, but it took effect ſome time or other, this very Reſolution was afterwards enacted, firſt by the ſtatute of the fourth and fifth, and afterwards by that of the ſixth of Queen Anne, which provides, that if any Member of the Houſe of Commons ſhall accept of an office from the Crown, his election ſhall be void, and a writ ſhall iſſue for a new election: Whereby the ſalutary object of the Reſolution of 1680 no longer depended upon the diſcretion of the Houſe of Commons, either for renewing the Reſolution, or for granting, or refuſing leave to accept of offices. What a Reſolution of the Houſe of Commons *could* NOT *do, in that it was weak through the* want of legiſlative powers, a ſtatute did, by making what they intended by their Reſolution a *perpetual* Law; with this other advantage at the ſame time, that it made an eaſier exit for a *placed* Member, without voiding his ſeat by the diſagreeable circumſtance of an expulſion.

Such a reſolution, however, was the only remedy for the evil, while there was no Act of Parliament; and it did not, I apprehend, exceed the juriſdiction of the Houſe of Commons over its own Members. Nor will the argument I am now engaged in, ſuffer me to omit obſerving, how carefully the ſanction annexed to the Reſolution, is confined within the bounds of the conſtitutional powers of the Houſe of Commons. They reſolve that the offenders, as they are called, ſhall be expelled. But they do not reſolve that the offenders againſt their Reſolution, ſhall be *diſabled* to ſit in Parliament upon a re-election.

Such a Reſolution would indeed have been highly abſurd, as it would have been reſolving, that perſons holding offices under the government ſhould be incapable of being in Parliament, although there were Members ſitting at the very time in the Houſe, who were in office when they were choſen. And no Parliament ever did exiſt, into which ſervants of the Crown were not elected. So that they might as well have reſolved at once to expel all placemen who were then Members, and thereafter to have admitted none who were in offices of truſt; which would have been an incapacity, with a vengeance, by a *Reſolution*, and would have added one claſs more of diſqualification to thoſe our two Authors have given us, and that the moſt brilliant of them all.

But the Houſe of Commons in 1680 knew better things. Not like the Parliament in 1640, that *expelling*, *diſabling*, and *ordinance-making* Parliament, which began with extending their own powers, and ended with annihilating every power but their own uſurped dominion, voting out of exiſtence both the King and the Houſe of Lords; not like them, the Houſe of Commons 1680, kept within the line marked out by the true Law of Parliament.

Parliament. A power to expel they knew they had, and that thereby the conſtituents would be divorced from a Member who had proſtituted himſelf to the Crown, and would be free to chooſe another, when they thought him unfit to be longer truſted as their Repreſentative. But to a power of *diſabling*, thereby to cramp the freedom of election, in caſe the conſtituents thought their former Member worthy of their truſt, notwithſtanding his having accepted a place, which might be with their conſent, though without leave of the Houſe of Commons;—To ſuch a power they did not pretend, notwithſtanding all the examples and authorities which our two Authors quote to us at this day, and could, if they had been Members of the Parliament 1680, have quoted to the Houſe of Commons at that time, from the Parliament of 1640.

That the Houſe of Commons in 1680 entertained no idea of a diſabling power in them, is evident from this conſideration, that the ſame reaſon that led them to reſolve that a perſon ſhould be expelled for accepting a place, would have alſo moved them to diſable him from being again elected, as the cauſe of expulſion implied the opinion of the Houſe, that a perſon who had ſurrendered himſelf to the influence of the Crown, was unfit any longer to be a truſtee for the people.

The Statute of the 4th and 5th, and that of the 6th of the Queen, keep the ſame conſtitutional line with the Reſolution of 1680-1. For though the Parliament undoubtedly could have made an Incapacity, as well as a voidance of the Seat, in every caſe of accepting of a Place, as it has actually done with regard to ſome Offices, yet they are not only ſtopt with declaring the Members election void, leaving him capable, as of common right to be re-elected; but an expreſs proviſo is added, declaring

declaring that he ſhall be capable of being again elected as if his ſeat had not become void. This was certainly not neceſſary, becauſe the Common Law would have ſecured that, but it was very proper to make it clear by an explicit declaration, that there might not be room for a doubt or queſtion upon the ſubject.

The obſervation which has been made does not, however, exhauſt all that is to be extracted out of the Reſolutions of 1680, to which we have referred, material to our preſent purpoſe. For, according to the doctrine we have in this eſſay been combating, Incapacity is the neceſſary effect of Expulſion: And therefore any Member expelled under the ſanction of thoſe Reſolutions, was, of courſe, diſabled to be re-elected into the ſame Parliament. The Parliament in which the Reſolution was made, was diſſolved a very few months after the date of it; and it does not appear from Journals, that the Reſolution had any actual conſequences.

Be that as it may, there is no need of the fact to argue upon, for the Reſolution itſelf is authority ſufficient to ſay, that a Member might have been expelled, by virtue, and in conſequence of it. And a Member ſo expelled muſt, according to the doctrine of our two Authors, neceſſarily have been incapacitated for that Parliament which expelled him.

Such an incapacity might have gone as far as government offices reach, which is no ſhort way. This would have been a moſt powerful example for illuſtrating the poſition of the Author of the *Caſe*—"That the Houſe of Commons have adjudged perſons incapable of being elected upon general principles of conſtitutional policy." It is ſo much more proper than any one inſtance he

he has produced, that I wonder how he omitted it.

Now I would only aſk the gentlemen, If they really think, or take upon them to maintain, that a Member expelled under this Reſolution of 1680, would, *ipſo facto*, have been diſabled and incapable of being re-elected into the ſame Parliament? If they anſwer *no*; they muſt give up their doctrine of implied or neceſſary incapacity. If they ſay *yes*, they muſt admit that, with an ill-humoured or factious majority of a Houſe of Commons, the moſt meritorious men in the kingdom might have been incapacitated to ſit in Parliament, for the very reaſon which, of all others, beſt qualified them to be there, and made it moſt for the good of the Common Wealth that they ſhould be Members: And conſequently, that either Government muſt have been deprived of the beſt abilities in the land, when the publick ſervice, and perhaps the ſafety of the ſtate require them, or the People of England robbed of the moſt worthy Repreſentatives.

This, I own, is a ſituation of things to bring the country into, to authorize which I ſhould require a higher authority than that of a Reſolution of the Houſe of Commons.

But the foundation and force of this argument, is not confined to the Reſolution of the Houſe of Commons, in 1680. It is further ſtrengthened and illuſtrated by the proviſion of the firſt Act of the 5th and 6th of K. William and Q. Mary. By that ſtatute it is enacted, "That no Member "of the Houſe of Commons, ſhall be concerned "in the collection, or management of the duties "granted by that Act, or that ſhould thereafter be "granted by any other Act, except the Commiſ-"ſioners of the treaſury, and cuſtoms, and ex-"ciſe." The clauſe is merely *prohibitory*, without

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any poſitive ſanction annexed to it, declaring the ſeats void, as was done by the after ſtatutes of the Queen, in the caſe of a Member accepting of any office whatever from the Crown. Nor is there any expreſs proviſion that a perſon concerned in theſe duties, ſhould be incapable of being elected or ſitting in the Houſe of Commons, otherwiſe than as the proviſion, that no Member ſhould be ſo concerned, virtually implied an excluſion from the Houſe of any perſon under that predicament.

Under this proviſion of the Act of W. and M. many Members were expelled for being concerned in the duties granted by that and ſubſequent Acts of Parliament, and the proceedings of the Houſe upon theſe occaſions varied a little in form, though ſubſtantially they were always the ſame. In the firſt inſtances in 1698, the Houſe Reſolved, That the Members, having been concerned, &c. *contrary to the Act* of the 5th and 6th, &c. *be expelled this Houſe.* In other inſtances further down, as in 1700, the Houſe proceeded, by reſolving firſt, That the Member having been concerned, &c. *was guilty of a breach of the ſaid Act* of the 4th and 5th of K. W. and Q. M. and then reſolved, That the Member, *for the breach of the ſaid Act*, be expelled this Houſe *.

Now,

* The following are all expulſions in conſequence of the proviſion of the Act of the 5th and 6th of W. and M.

Feb. 10, 1698. James Iſaacſon, Eſq; Member for Banbury, expelled.

13, 1698. Henry Cornish, Eſq; Member for Shaftſbury, expelled.

14, 1698. Sir Henry Furneſe, Member for Bramber, expelled.

Eod. Die Samuel Atkinſon, Eſq; Member for Harwich, expelled.

20, 1698. Richard Woolaſton, Eſq; Member for Whitchurch, expelled.

In theſe Caſes there was but one Reſolution of the Houſe, viz. that

Now, that a Member ſo expelled was incapable of being again elected, while he held the office for which he was expelled, may be legal reaſoning enough, becauſe the prohibition of the ſtatute is, that no Member ſhall be ſo concerned, which, as already ſaid, implies an excluſion. But if the perſon expelled gave up his office, he then came to ſtand upon the ſame footing, that a perſon expelled under the Reſolutions of 1680 would have done. And therefore, the queſtion which we put upon a Caſe ſuppoſed under the reſolution of 1680, may be put upon the Caſes under the Act of W. and M. Whether the gentlemen think that a perſon expelled for a breach of that Act, or for acting contrary to it, but afterwards giving up his office, and thereby taking himſelf out of the circumſtances which brought him within the Law, would then have been incapable of being elected into Parliament, merely becauſe he had been expelled the Houſe; which could be the only pretence of an incapacity affecting him after he had given up the place, the holding of which was, by the ſtatute, rendered incompatible with being a Member of the Houſe of Commons?

The Gentlemen themſelves have given an expreſs anſwer to the queſtion, as to the Caſe ſtated

that the Perſon being a Member of the Houſe of Commons, and having ſince been concerned and acted, &c. *contrary to the Act made* in the 5th and 6th years of his Majeſty's reign, for granting ſeveral Duties, &c. *be expelled this Houſe.*

Feb. 19, 1700. Sir Henry Furneſe, Member for Sandwich, expelled.

20, 1700. Sir Gilbert Heathcote, Member for London, expelled.

In theſe Caſes there were two Reſolutions of the Houſe. One, that the Perſon having ſince his being elected a Member, been concerned and acted, &c. *was guilty of a breach of the Act*, made in the 5th and 6th years of his Majeſty and the late Queen. By the other, it was reſolved, that the Member, *for the breach of the ſaid Act*, be expelled this Houſe.

upon this Act: And their anſwer is, That a perſon, though expelled for breach of that Act, if he afterwards gave up his place, was not *incapable* of being re-elected. For they have argued, that Mr. Woolaſton, who was one of the Members expelled for acting contrary to that ſtatute, was not incapable of being re-elected into the ſame Parliament which expelled him, after he gave up his place: And upon that ground they have ſupported his re-election and ſitting in the Houſe as legal.

The force of the Caſe, however, reduces them to the neceſſity of maintaining, that the word *expel*, was improperly uſed in Mr. Woolaſton's Caſe; becauſe, as they ſay, he was only turned out of the Houſe in order to carry an Act of Parliament into execution.

What the gentlemen therefore admit upon the Caſe of Mr. Woolaſton, is ſufficient for our argument. At the ſame time, we cannot help telling them, that their own argument upon that Caſe is very far from being juſt or accurate. For in all the expulſions in conſequence of the Act of the 4th and 5th of W. and M. the Houſe treated a Member's accepting or holding a place, contrary to the prohibition of that ſtatute, as an *offence* which expoſed him to cenſure, being, as the reſolutions in the latter inſtances termed it, a *breach* of an Act of Parliament, for which offence they expelled the Member. And, indeed, it is impoſſible to ſay, that acting contrary to the Act, was not an offence in the proper ſenſe of the word, becauſe it was not only a breach of a prohibitary ſtatute, but an attempt to elude a ſalutary Law, made on purpoſe to ſecure the purity and independence of the Houſe of Commons.

Withal, as the Gentlemen themſelves anſwered our queſtion, when applied to the Caſe of King William and Queen Mary, in the negative, we

do

do not ſee how they can give a different anſwer to the ſame queſtion, when applied to a Caſe ſuppoſed under the Reſolution of 1680. But it is no matter whether they do or not. For the Act of W. and M. is a prohibition upon the Members of Parliament, of the ſame nature and effect with the Reſolution of 1680; and differs from it only in this circumſtance, that the ſtatute has no poſitive ſanction at all annexed to it, whereas the Reſolution has the ſanction of expulſion annexed. And as the Houſe of Commons treated the breach of that ſtatute, as an offence meriting expulſion, although there was no expreſs ſanction to that purpoſe in the ſtatute; it is clear, every expulſion in conſequence of that ſtatute, was of the ſame nature with an expulſion under the reſolution of 1680: And therefore either both rendered incapable, or neither. And the Gentlemen ſay, Mr. Woolaſton, who was expelled in conſequence of the ſtatute, was not incapacitated conſequently, neither would one expelled under the ſanction of the Reſolution of 1680 have been diſabled.

We would therefore recommend to the Gentlemen, to re-conſider their own diſtinctions upon what they are pleaſed to call an improper uſe of the word *expel*, in the Caſe of Mr. Woolaſton. For when they compare that Caſe with the ſanction of expulſion annexed to the Reſolution of 1680, they muſt, I think, ſee that the term was juſt as properly uſed in the one Caſe, as it could have been in the other; and not improperly in either. But when they compare it with the other Caſes, which are in every reſpect the ſame with Mr. Woolaſton's, and obſerve that in all of them, as in Mr. Woolaſton's, the word *expel* was uſed, and the expulſion founded upon a Reſolution implied or expreſſed, that the Member was guilty of a breach of the Act of Parliament, I cannot conceive what

ground they will find left to argue that the word *expel*, was an expreſſion improper to have been uſed in the Caſe of Mr. Woolaſton, more than in any of the other caſes which occurred under the ſame ſtatute.

For that reaſon indeed, we cannot perceive why the attempt has been made to treat or argue upon Mr. Woolaſton's caſe, as a ſingular one, when it is but one of many in the preciſe ſame circumſtances, and in which other Members were expelled for the ſame offence; the Houſe of Commons having adjudged it to be an offence in them all, and not in one more than another, to be guilty of a breach of that Act. The only real diſtinction in Mr. Woolaſton's caſe is, that after he gave up his place, he was re-elected and ſat in Parliament; but that operates in this argument no otherwiſe than to prove, that every other one of the Members, expelled as he was for the ſame offence, and under the like circumſtances, might have been re-elected, and ſat in the ſame manner, notwithſtanding their expulſion, if they had alſo given up their places. Which makes Mr. Woolaſton's caſe, when confronted with the other caſes of expulſion for the breach of the ſame ſtatute, amount to an abſolute demonſtration, that capacity was not implied in expulſion, in the ſenſe and underſtanding of that Houſe of Commons which expelled Mr. Woolaſton, and yet ſuffered him to ſit upon a re election.

It alſo deſerves to be remarked, that it was not 'till after the Act of the Queen, which declared the ſeat of any Member accepting an office void, and appointed a new writ to be iſſued, that the ſhort method now practiſed in purſuance of that ſtatute came into uſe. For before that, all the Members who accepted places contrary to the prohibiton of the ſtatute of the 4th and 5th of K. W. and Q. M. (which

M. (which was the firſt Law that created a diſability by office, were formally expelled. And yet if the Houſe of Commons had not conſidered the accepting of the office, contrary to the prohibition of the ſtatute, or, *in breach of the Act*, as it is termed in the ſentences of expulſion, to be an offence, and inflicted expulſion as a cenſure for the offence, they might then as well as now, have ſimply ordered a new writ to be iſſued in the room of a Member, who had accepted ſuch a place as was incompatible with his continuing a Member, whereby his ſeat was neceſſarily become void.

But as they did conſider the thing in the light of an *offence*, and therefore expelled the members acting in ſuch offices, it neceſſarily follows, that all thoſe expulſions, and Mr. Woolaſton's among the reſt, were as effectual incapacities, as any expulſion whatever, if the doctrine of our Authors prevail. But they have themſelves excepted Mr. Woolaſton's caſe, and therefore, with it, they muſt give up all the reſt, as there is no difference between his caſe and the others under the ſame ſtatute. And what is more, as Mr. Woolaſton was re-elected, which fairly brought the queſtion of *incapacity* into the field, his being allowed to ſit, is a *judgment* of the Houſe of Commons, that his expulſion inferred no incapacity; and conſequently that no expulſion did: becauſe, from what has been ſaid, it is manifeſt his caſe was a common expulſion, and not an accidental, improper, or inaccurate uſe of the word *expel*, as the Gentlemen have argued.

I had rather uſe a convincing argument, than confident expreſſions, and therefore I ſhall not, after the example of the Writer of the *Conſiderations*, ſay what has been laſt offered is unanſwerable and deciſive. It is ſubmitted to the judgment of the Reader. But I own I cannot reconcile together the grounds of the reaſoning we have juſt concluded

concluded, and the doctrine contended for by our opponents, under either branch of the queſtion. And I am perſuaded I ſhall not be thought to have digreſſed from my ſubject, by introducing the conſideration of the Reſolution of 1680, as connected with the Act of W. and M. into this debate. I now ſhall accompany the Writer of the *Conſiderations* to the

„ Sixth and laſt claſs or deſcription of men mentioned by him, and alſo taken notice of by the Author of the *Caſe*, viz. *Perſons in execution at the time of their election*, who, it is ſaid, have *ſtood diſabled by Reſolutions of the Houſe of Commons, without an Act of Parliament.*

The ſhorteſt way to anſwer this Claſs, would be by denying the *fact*, that perſons under this deſcription *do* ſtand adjudged by the Houſe of Commons to be incapable of being elected. I do not mean to ſay, the Houſe of Commons never did ſo determine. But, as in the caſes adjudged in that manner, they did not intend to make a Law of incapacity by their Reſolution ſingly, but only to determine according to the law, as they conceived it to be; we have their own authority for it, that ſuch determinations were erroneous, becauſe the lateſt deciſions contradict them. And this is but one more of the many inſtances to prove, that if we had no other notion of the Law of Parliament, but that talked of by theſe Gentlemen, that it conſiſts of the deciſions of the Houſe of Commons, we ſhould really have no ſuch Law at all, if a Law means a fixed and binding Rule. We ſhould only have a ſet of disjointed, inconſiſtent, and contradictory determinations, differing as the pragmatical genius of the leading men in Parliament diſagreed at different times. But it will be uſeful, and the manner in which both our Authors have treated this matter, makes it neceſſary to go a little deeper into it.

The Writer of the *Conſiderations* mentions the noted caſe of Sir Thomas Shirley, in 1604, in which, he ſays, "The queſtion, as to the diſabi-"lity of perſons in execution, was much agitated, "but that the curious reading in thoſe debates, is "not exactly applicable to the preſent caſe, be-"cauſe the writ of execution, though it iſſued be-"fore, was not executed upon Sir Thomas 'till "after his election." He farther informs us, That during the dependance of that caſe, a bill was brought into the Houſe of Commons *for diſabling Out-laws, Perſons in Execution, and Recuſants Convict, from being of the Parliament*; which bill was rejected on the third reading, without one Yea. But the reaſon of the rejection, he tells us, was not "that the Houſe of Commons then thought that "perſons under that deſcription ſhould be allow-"ed to ſit; but that they knew they were ſuffici-"ently ſecured from ſuch a diſgrace by the *Law* "*of Parliament*, as it then ſtood; and *that they* "*had a right to determine upon that Law*, and did "not chooſe to ſubmit their legal powers to be "diſcuſſed and decided upon by the other two "branches of the legiſlature:"——"And that it "was, and *continued to be* the Law of Parliament, "*that perſons actually in execution were not eligible*, "appears (our Author ſays) from two caſes, which "happened a few years after." One is the caſe of Mr. Gifford, who was admitted to have privilege (17th Feb. 1625) becauſe it was found, on examination, that he was not in execution 'till after his election. —— The other is the caſe of Mr. Thomas Monk, who *having been in execution before and at the time of his election*, a new writ was ordered (24th Feb. 1625) to iſſue in his room, as of *a perſon incapable of being elected.*

The Author of the *Caſe* alſo cites the caſe of Sir Thomas Monk; and he mentions another in 1661,

1661, of the election for Leinſter, in which it was adjudged, that the denying of the Poll to Mr. Coningſby, who was put in nomination, *did not avoid the election*, he having been a *priſoner in execution* for debt, and not eligible: And the other two Canditates were declared duly elected. This Author alſo, in a *note*, tells us, "The reaſon why a Perſon in execution is *not eligible*, is *obvious*, becauſe ſuch an one is not bailable, conſequently he cannot attend to diſcharge the duty of a Repreſentative: whereas a perſon arreſted on meſne proceſs is admiſſible to bail."

I have thrown together the whole of what both the Gentlemen have ſaid, in order preſerve the unity of the anſwer thereto, and to make the application of it the more eaſy. And I do apprehend there cannot well be a more inaccurate ſtate of facts, than that they have given us, or a more erroneous ſyſtem of reaſoning, than they have built upon it.

I am really aſhamed to repeat what has been ſo often ſaid, as to the fallacy that pervades the whole argument of theſe Gentlemen, and meets us again in the words now quoted, as it does in every paragraph when they talk of the *right of the Houſe to determine upon the Law of Parliament*, as if that were any proof, that what is determined neceſſarily makes the Law of Parliament: Though nothing can be more certain than it is, that if the Houſe of Commons were now to determine ſome things in a certain way, for example, that they have a ſhare in the judicature of the laſt reſort, or that now after two hundred years poſſeſſion of the right of the eldeſt ſons of Engliſh Peers, to be elected into the Houſe of Commons, they have no ſuch right: Such determinations, while they profeſſed, as theſe Gentlemen ſpeak, to *determine upon the Law of Parliament*, would be deciſions againſt it,

and

and deſtructive of the conſtitution of Parliament as now modelled, beyond all doubt; and ſo in other inſtances which have been, and many more which might be mentioned.

But as to the claſs now before us, and the determinations concerning it, there is much matter for particular obſervations.

In the firſt place, two things are here confounded, in their own nature manifeſtly diſtinct. The queſtion of *Diſability* or *Capacity* to be elected, and the Privilege of Parliament when choſen. Suppoſing perſons in execution were excluded from privilege, it would by no means follow in Law, nor is there any reaſon of the thing for it, that being in execution ſhould be a diſability to be elected, or ſhould void the election of a ſitting Member: For the perſon, though in execution to-day, may be diſcharged to-morrow on ſatisfying the debt, and be as much a freeman as any in the kingdom. Upon which principles it was held, even in the days when queſtions were made as to ſickneſs and other things, about which there is now no queſtion, that *Captivity* was no objection to an election. And ſo it was reſolved (9th November 1605) "That Sir Henry Carye, a *Cap-*
"*tive**, elected and returned, ſhould not be re-
"moved, but ſtand ſtill as a Burgeſs."

So in the caſe of Mr. Fitzherbert (35 Eliz.) who was arreſted two hours after his election, and before his Indenture was returned to the Sheriff, as the Journals inform us, "There grew two queſ-
"tions, 1. Whether he was a Member. 2. Admit-
"ting he were, yet whether he ought to have
"privilege?" And "The judgment of the
"Houſe was, that Mr. Fitzherbert was by his

* The Journal does not explain what ſort of captivity was here meant.

" election a member thereof, yet he ought not to " have privilege in three reſpects. 1. Becauſe " he was taken in execution before the return of " the Indenture of his Election, &c."

There are Caſes at this day excepted by ſpecial ſtatute from Privilege. Certain debtors to the Crown have it not; and might in the excepted Caſes not only be *in Execution*, but might be arreſted on meſne proceſs, if the *Perſonal* Privilege, (which by the means of artificial prorogations is now perpetual) were not ſaved, as I believe it generally is by thoſe Acts of Parliament, which take away Privilege in particular Caſes; but ſuch a Caſe as that would not infer a Diſability.

The reaſon therefore given by the Author of the *Caſe*, in his Note, why Perſons in Execution are not eligible, and which, I preſume, is his own, becauſe I ſee no Authority cited for it, viz. That they are not bailable, is ſo far from being obvious, as he ſays, that it appears not only to be very inſufficient; but, with all deference to him, is hardly intelligible. If not being bailable were a ground of Incapacity to be choſen, as he affirms, much more ought it to deſtroy Privilege, ſo as neither to ſtay the proceſs of Execution, or to operate the diſcharge of a Member upon whom it is executed. Yet I do not find that the Author inſiſts upon this as Parliamentary Law; and if he did, I am confident it would not be adopted by the Houſe of Commons at this day. But if it were to have that effect, why ſhould it work an immediate Incapacity, or Diſability; ſeeing, as already obſerved, being in Execution, may not occaſion an impoſſibility for one day to diſcharge the Duty of a Repreſentative, which is the only reaſon the Author gives for it's being an Incapacity; and Sickneſs, or being an Ambaſſador, may lay a Member aſide from his attendance,

attendance, or make him abſent for years, and yet neither of theſe create an Incapacity.

Not attending, however, to this diſtinction between Diſability and want of Privilege, or chooſing to overlook it, the Writer of the *Conſiderations* refers us to the Caſe of Sir Thomas Shirley and Mr. Gifford, as Caſes in which, as he ſays, the queſtion of *Diſability* was agitated. But there is not a word of ſuch a queſtion in either of theſe Caſes. Sir Thomas Shirley's Caſe is moved, at the firſt, expreſsly as a matter of *Privilege*. The entry in the Journals (22 March, 1603,) is in theſe words, "This" (referring to an immediately preceding motion) "being a motion tending to "*matter of Privilege*, was ſeconded with *another* "by Mr. Serjeant Shirley, touching an Arreſt "made—upon the Body of Sir Thomas Shirley, "&c.—and he prayed that the Body of the ſaid "Sir Thomas might be freed according to the "known *Privilege of the Houſe*."

In conſequence of this motion, a writ of *Habeas Corpus* was immediately ordered, as it is expreſſed in the Journals *according to the ancient Privilege and Cuſtom*. The whole enquiry and proceedings that afterwards enſued, which were the longeſt, and the ſtrangeſt that ever occurred in any caſe of the kind, by the unaccountable warfare with the Warden of the Fleet, who would not obey the Orders of the Houſe; the whole go to the point of Privilege, and to the mode of making it effectual under the particular circumſtances of the Caſe: A queſtion of Diſability was never once glanced at.

After a full ſearch into Precedents, and great conſideration, the queſtions at laſt ſtated in the Houſe (16th April 1604) were theſe three, "1. Whether Sir Thomas Shirley ſhall have Pri-"vilege? 2. Whether preſently, or to be defer-

" red till farther order? 3. Whether we shall be " Petitioners to his Majesty, according to former " Precedents, for some course of securing the " debt, and saving harmless the Warden of the " Fleet? Which questions being severally put, " were all resolved in the affirmative."

In consequence of this, a Bill was actually brought in, and passed by both Houses, for securing the creditor's debt, and when, during the obstinate dispute with the Warden of the Fleet, a Petition was prepared to the King, to come and give the Royal Assent to the Bill, as it is entered in the Journals, " it was not thought fit to " proceed in that manner, being, as was con- " ceived, some impeachment to the *privilege* of the House." It appears they were determined, to assert and make effectual the Privilege of Parliament, by their own authority, in opposition to the old Precedents, of which there are many, of particular Acts of Parliament for delivering Members, and even the servants of Members from custody. Sir Thomas Shirley was at length brought out of the Fleet by the Serjeant with the Mace, and a second Bill was passed for indemnifying the Warden, the first having been found faulty: And the persons concerned in making the arrest, were punished by the House for *breach of Privilege*.

From this detail the Reader will judge, whether it be true that the Writer of the *Considerations* says, " that the Question of *Disability* was agitated in this Case;—or if, as we set out with saying, it was simply a question of Privilege; and for the faithfulness of the extract we refer to the Journals themselves.

The other Case of Mr. Gifford was a short one, but clearly also a question of *Privilege* only, and not of Disability. The first motion was, *that he might be sent for to attend his service in the House:* And

And the doubt, as to his being entitled to Privilege, arose upon the same ground on which Privilege had been denied to Mr Fitzherbert in the Case above referred to in 35th Eliz. viz. That he had been in execution before the return of his Election. But on examination, it appeared, that the Indenture was, by a mistake of the Returning Officer (who imagined it must be of the date of the next County Court,) dated after the Writ of Execution had been executed, but that the Election itself was on a day before, which ought therefore to have been the date of the Return. The Indenture of Return was ordered to be amended in it's date, and after the amendment was made, it was Resolved, "That Mr. Gifford *had Privilege*, "and to be delivered out of Execution," and a Writ of *Habeas Corpus* was accordingly ordered for that purpose. This is the other Case, in which the Writer of the *Considerations* says, the question of *Disability* was agitated.

These two Cases therefore, instead of proving (which is the purpose they are produced for,) that *being in Execution* was in those days held an incapacity to be Elected, only prove that *Privilege* and *Capacity* did not always go hand in hand, and that they ought to be distinguished: for proving which, we had no need to go so far back; for in the very Middlesex Election, we saw that there was an *Execution*, to which Privilege did not extend, yet nobody attempted to move for a new Writ upon account of the Execution as a *Disability*, even after the Record, on which the Execution proceeded, was called for, and was lying upon the table of the House of Commons.

But, secondly, the Writer of the *Considerations* seems exceedingly to have mistaken the tendency of his own argument to prove, that being *in Execution* was a *Disability* at the time of Sir Thomas Shirley's

Shirley's Caſe, when he informs us, that during the dependance of that Caſe, a Bill was brought into the Houſe of Commons *for diſabling Perſons in Execution, Outlaws, and Recuſants-convict, to be of the Parliament.* For that Bill, from the very title of it, could not be a *declaratory* Law, like the Bye Clauſe put into the Statute to enact penalties for preventing Minors being choſen, or pretending to ſit in Parliament; and being a Bill to *diſable* thoſe perſons, it, of itſelf, proves that they were not at that time under a *Diſability*, and that it required an Act of Parliament to *diſable* them; ſo that the Writer's *proof* only *diſproves* his argument.

As to the reaſon the Writer of the *Conſiderations* gives out of his own head (for there is not a ſyllable of it in the Journals) why the Bill was *una voce* rejected, viz. "That the Houſe knew they were "ſufficiently ſecured from the diſgrace of ſuch "Members by the *Law of Parliament*;" being a reaſon ſpun out of his brain, as Spiders do cobwebs out of their bowels, it is juſt of ſuch a flimſy contexture. The Houſe, indeed, knew "that *Recuſants-convict* were ſufficiently diſabled by the Statute of Elizabeth, of which we ſometime ago put this Writer in mind, becauſe it appeared he had forgot it. But the Houſe knew, too, that *Outlawry* in civil Actions, and *being in Execution*, were no *Diſabilities.*

They knew this from their own Journals, notwithſtanding our Author's aſſertion. So much we learn from the famous Caſe of Sir Francis Goodwin, in which the great conteſt was between James the Firſt, and the Houſe, about their Juriſdiction; the account of which, fills up ſo great a part of the performance of the Author of the *Caſe*: For we ſee Outlawry was thrown out as one of the Objections againſt Sir Francis; and the Anſwer made to it is, "that notwithſtanding

" the two Outlawrys againſt Sir Francis, which " were both in Queen Elizabeth's Reign, (i. e. " long before Sir Thomas Shirley's Caſe) he had " been *choſen*, *admitted*, and *ſerved* as a Member " of the Houſe, in the ſeveral Parliaments holden " 39th and 43d Elizabeth."—And many Precedents were referred to on that occaſion, not only of Members who were outlawed, and yet had been allowed to have Privilege *, but of Perſons who had been choſen and admitted to ſerve, though under Outlawrys, particularly one Mr. John Killigrew, who had fifty-two Outlawrys returned againſt him, and yet was admitted to ſerve in the Houſe; and Sir William Harcourt, who was found to be eighteen times outlawed, and yet was admitted to ſerve.

Theſe Caſes are ſufficient to ſhow, that the reaſon aſſigned by the Writer of the *Conſiderations* for rejecting the Bill for diſabling Outlaws, is not true. For from thoſe Caſes, the Houſe could not but know, that they were not ſecure from the diſgrace of Outlaws ſitting by the Law of Parliament; and that the Law continued to be ſo after Sir Thomas Shirley's Caſe, is proved by the Caſe of Ferdinando Huddleſton, Knight of the Shire for Cumberland, in which it was reſolved (28 May 1624) " that his being outlawed ought not to prejudice " his Election."

The reaſon is equally falſe with regard to Perſons in Execution; for the Houſe muſt not only have known that the objection to them was not near ſo ſtrong as againſt Perſons outlawed; but they had further an expreſs general Reſolution of the Houſe as far back as 1585, which we had occaſion formerly to cite " That Perſons in Execu- " tion, and thoſe viſited with Sickneſs ſhould not " be

* In the 1ſt, 23d, and 35th of Queen Elizabeth's reign.

" be removed," which was tantamount to declaring that they were not incapable to be chosen, because if they had, they must also have been incapable to sit; but it is clearly proved by that old Resolution, that the House did not know (as the Writer of the *Considerations* says they did) that they were sufficiently secured by the Law of Parliament from the disgrace of Persons in Execution sitting in the House; because it proves that they not only did sit, but were secured in their seats by the Resolution *. And the Case of Mr. Fitzherbert above referred to in the 35th Eliz. still more directly proved by the question stated and decided in that Case, that the being in Execution did not disable to sit, or continue a Member of the House, though he was not allowed to have Privilege.

The fact therefore is, that the House knew when the Bill that was brought in during the dependance of Sir Thomas Shirley's Case was rejected, that the Law stood just the contrary of what the Writer of the *Considerations* has asserted the House then knew to be the Law of Parliament. The better reason therefore to be assigned for *dashing* the Bill, must have been, that they had no mind to alter the Law, especially by an occasional Bill, which tended to prejudicate a Case actually depending.

Thirdly, If it be evident from what has been said, as it certainly is, that it was not even what the Writer of the *Considerations* calls the *Law of Parliament*, at the time of Sir Thomas Shirley's Case, (which is the only one he cites before Mr. Gifford's, in 1605,) that persons *in Execution* were incapable

* This Resolution also proves, that the reason of the ineligibility of Persons in Execution, given by the Author of the *Case*, (that not being bailable, they are not able to discharge the Duty of a Representative,) is not a good reason, as indeed we have already shown it to be so very inadequate, that it only proves the Law is not so.

incapable of being choſen; it muſt alſo be pretty clear, that neither Mr. Gifford's Caſe, nor any other ſubſequent to Sir Thomas Shirley's, can prove that what *had not been* the Law, *continued*, as the Writer ſays it did, *to be* the Law. But the contrary of his aſſertion is alſo demonſtrated by a direct authority. For in 12 Jac. Sir William Bamfield, who ſtood committed by the Lord Chancellor for a Contempt, (which is to all intents and purpoſes of the ſame effect as an Execution, and is not bailable,) before his election, was not only allowed to be well choſen, but was allowed to have Privilege, and was delivered by order of the Houſe.

Whatever, therefore, may have *appeared* to the Writer of the *Conſiderations*, we are perſuaded it will not, after what has been obſerved upon Mr. Gifford's Caſe to any other perſon appear from thence, as our Author ſays it does, that the Law of Parliament either *then was*, or *continued to be* as he ſtates, that perſons in Execution were not eligible, as to which there was, as we have ſeen, in that Caſe, no queſtion.

After ſuch a ſubſtraction from the Gentlemens Authorities, we muſt give them credit for the Caſe of Sir Thomas Monk, who was certainly deprived of his Seat. But upon what principles this was done we know not, for all that the Journals contain, is barely "that upon the informa-"tion in the Houſe, that Sir Thomas was in "Execution before, and at the time of his Elec-"tion, a Writ was ordered to iſſue for a new "choice in his room."

It is alſo true, that the Caſe of Leinſter, in 1661, ſtands as ſtated by the Author of the *Caſe*, that it was there adjudged that it did not void the Election, that the Poll had been denied to the

Candidate who was in execution at the time thereof, and the other two Candidates were declared duly elected *.

As to the point in queſtion in thoſe caſes, the determinations only prove the fluctuation of the deciſions in the Houſe of Commons; but they are far from ſupporting the poſition of the Writer of the *Conſiderations*, that perſons in execution, who, as we have ſeen, were not, before the caſe of Sir Thomas Monk, diſabled by any Law, or by any reſolution, but on the contrary, were held by many determinations to be capable of being elected, *do now ſtand diſabled* by reſolutions of the Houſe of Commons: For the later determinations, as has been ſaid, directly contradict the poſition.

Here we can by no means praiſe the candour of either of our Authors. The Writer of the *Conſiderations* ſtops at Sir Thomas Monks caſe, in 1625; and the Author of the *Caſe* comes no far-

* We cannot help however obſerving on this determination, that it juſtified a liberty taken by the Returning Officer, which the Houſe has, on other occaſions, ſeverely animadverted upon. In 18 Jac. 1. when the Sheriff took upon him to return Sir Thomas Bowman, knight of the ſhire for the county of Leiceſter, although Sir George Haſtings had a majority of votes, on pretence that Sir George was incapable to be elected, by virtue of the old Statutes of Hen. V. and Hen. VI. as not being a Reſiant in the county, the language in the Houſe was, "the Sheriff is "judge of the number of voices, but not of ability or diſability; "*ergo*, his return naught." And the Sheriff and Under-ſheriff were ſent for as delinquents, and cenſured as *great Offenders to the Houſe and the State*, although they had the pretence of an Act of Parliament to warrant what they had done. So tender was the Houſe at that time of ſuffering objections of diſability to be ſubject to the cognizance of a Returning Officer, under colour of his judicial quality being exerciſed ſo as to abſorb his miniſterial character, which is the chief part of the duty of a Returning Officer. There were, doubtleſs, reaſons, why the Returning Officer, in the caſe of Leinſter was juſtified, inſtead of being puniſhed for a ſimilar conduct, by the Reſtoration Parliament, where the influence of the court prevailed.

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ther down than the caſe of Leinſter in 1661. Yet they both muſt have known, that there were later caſes on the point in the Journals; and concealing them was only an unfair attempt to miſguide thoſe who do not read the Journals, which is a ſort of conduct that cannot ſerve any cauſe. We ſhall ſtate how the fact ſtands upon the Journals.

In the 2d of W. and M. 1689-90, Mr. Montague was choſen for the borough of Stockbridge when he was in execution; and 25th March, 1690, a petition was preſented for him to the Houſe, ſtating that fact, and ſtating "that *by Law*, and "notwithſtanding ſuch his execution, he was a "perſon *eligible* to ſerve in Parliament, and was ſo "elected." And therefore praying that his privilege of Parliament might be allowed.

On this occaſion there was a full ſearch by a Committee into all the caſes, and a report made upon the 5th May, containing the whole precedents, down from the caſe of the Speaker Thorpe, who was executed in the reign of Henry VI. And it appeared there were two caſes later than that of Leinſter, in 1661, viz. Sir John Prettyman's, in 1675, and Sir Robert Holt's in 1676.

Sir John Prettyman was detained a priſoner in the King's-Bench on an execution, and he was, by order of the Houſe, delivered out of the cuſtody of the Marſhal, to attend the ſervice of the Houſe. And it is clear from the proceedings, that the arreſt was not a breach of privilege; for there is no notice taken of it as a breach of privilege, or any perſon complained of, or puniſhed on that account.

In Sir Robert Holt's Caſe, it is expreſsly ſtated, that he was taken *in execution out of privilege*; and alſo that Sir Robert was under an outlawry. No queſtion of *diſability* is ſtirred; but on thoſe grounds the Committee denied Sir Robert privilege, which was agreeable to antient precedents.

brought *farther arguments*, and better ones too, if he could have found any other caſe that furniſhed them.

What has been ſaid will, I believe, ſatisfy a reaſonable Reader, that the Caſes of Outlaws and Recuſants-convict, of neither of which he ſeems to have known *too much*, were not a quarter from which he could have drawn auxiliary arguments.

The Caſe of the Attorney General, which the Writer of the *Conſiderations* declines to argue from, I will mention, that it may add all the weight it can to his Claſſes: For I think it is the likeſt to a diſability, by a *mere reſolution* of the Houſe of Commons, of any I have met with. And ſo Lord Coke expreſſes it, "*by ſpecial order*," (ſays he) "of the Houſe of Commons, the Attorney General is not eligible to be a Member of the "Houſe of Commons." But at the ſame time, to do juſtice to this Caſe and to the *Law of Parliament*, as now clearly underſtood and ſettled, that the Attorney General is capable of ſitting in the Houſe of Commons, it is fit to underſtand how the *Special Order* which excluded him happened to be made, and what effect it had: Which will ſomewhat elucidate the notions theſe gentlemen would give us as to the Law of Parliament.

The queſtion as to the Attorney General, was firſt ſtirred in Parliament, 4to Jac. before which time, as appears from the Journals, the Attorney General had always been in the Houſe of Lords as one of the Attendants called by Writ. The queſtion aroſe upon occaſion of Sir Henry Hubbard, a Member of that Parliament, having been appointed Attorney General when Parliament was not ſitting. Sir Henry Hubbard is one of thoſe mentioned in the Note referred to by the Author of the *Caſe*, page 30, which, at the opening of the Seſſion, (19th, *November* 1606) "the Speaker pro-

" duced aſſent to him by commandment from the
" Lord Chancellor, containing the names of cer-
" tain Members of the Houſe, diſpoſed and em-
" ployed by his Majeſty, ſince the laſt Seſſion, in
" ſpecial Services; with direction to know the
" pleaſure of the Houſe, whether the ſame Mem-
" bers were to be continued, or their places ſup-
" plied with others."

All the Caſes having been referred to the Committee of privileges, their Report (22d November) is in theſe words, " Touching Sir Henry " Hubbard advanced by his Majeſty to the place " of Attorney General, it was remembered that " in 8vo Eliz. Mr. Onſlow, Sollicitor, being " called by Writ into the higher Houſe, was " afterwards choſen Speaker by this Houſe: Mr. " Jefferies alſo, the Queen's Serjeant, was de- " manded by this Houſe to do Service here. Ma- " ny precedents of the King's Serjeant and Sollici- " tor; none for the Attorney, *ſed eadam ratio.*"

The proceedings in the Houſe are entered in the Journal as follows.

" Touching Mr. Attorney, it was much diſpu- " ted what ſhould be the queſtion; at laſt the " queſtion agreed and ſo made."

" Q. Whether he ſhould be recalled, *admitting* " *that he was already called by Writ of Attendance* " *into the Higher Houſe, as the Houſe conceived he* " *was.*"

" Upon this Queſtion, the Houſe was not ſa- " tisfied, but would have it made, whether a-new " choice."

" The Houſe upon this grew to diviſion, and " by diviſion to confuſion, for they were not num- " bered, nor one part well underſtanding ano- " ther, they ſettled again, and made a new Queſ- " tion, viz.

" Q. Whether a queſtion ſhould be made of " it

" it; and by voice over-ruled that no queſtion " ſhould be made of it, but the matter ſhould " reſt, and ſo was underſtood and leftat that time."

The next day the Houſe met, the following is the firſt entry in the Journal. " Mr. Attorney " came in of himſelf, and continued by *connivance* " without farther order."

This is the firſt chapter of the *Law of Parliament* as to the Attorney General: A Law *made* by the *confuſion* of a Houſe of Commons; by a *diviſion* that could not be numbered, one part of the Houſe not underſtanding another; by a *determination* that *no queſtion ſhould be made*; and laſtly by the Attorney General's coming in of *himſelf*, and ſitting by *connivance*.

From this ſtrange ſtory, all that I can collect is, that as the Attorney General had uſually been called by Writ into the Houſe of Lords, as one of the Attendance of that Houſe, this Circumſtance was the only tangible objection to his ſitting in the Houſe of Commons, and the only thing which diſtinguiſhed his Caſe from that of any other Servant of the Crown: the Houſe conceiving, (as it ſaid) that Sir Henry Hubbard their Member, who had been appointed to the Office of Attorney General in the interval of the Seſſions, *was already called by Writ of* Attendance into the higher Houſe.

The Queſtion ſeems to have taken its riſe from the proceedings on former Occaſions, with regard to the Sollicitor General and King's Serjeant, as to whom the Fact, as upon the Journals was this: That in two inſtances, viz. thoſe of Mr. Onſlow, in 8vo Eliz. and Mr. Popham in 23 Eliz. they being Members of the Houſe of Commons, when appointed Sollicitors, were re-demanded from the Lords, notwithſtanding the Writ of Attendance calling them in to the Upper Houſe, and were both

both reſtored, as it is expreſsly ſaid in the two different Caſes, *becauſe the Houſe of Commons had the firſt poſſeſſion of them*; and both theſe Gentlemen are choſen Speakers, upon their return from the Houſe of Lords.

As to the Crown Serjeant, the caſe of Mr. Geffrey occurr'd in 18 Eliz. (6th Feb. 1575) in which it was "Concluded that, according to old "precedents, he *might* have voice as a member "of the Houſe, notwithſtanding his attendance in "the Higher Houſe as one of the Queen's Ser-"jeants, where he had no voice.*"

Sir

* The caſe of Mr. Onſlow, referred to in the above report, was this: Mr. Onſlow being a Member of the Lower Houſe, was, upon a prorogation of the Parliament, made Solicitor-General; and when the Parliament met again, immediately after the Queen's commiſſion was read in the Houſe of Lords, intimating her Majeſty's licence to proceed to the election of a Speaker, "It was moved" (as the entry ſtands in the Journal) by Mr. Comptroller for the Commons, "That, for that Mr. Onſ-"low, Solicitor-General, was a Member of the Lower Houſe, "he might be reſtored to join in their election, and upon con-"ſultation had among the Lords, Mr. Onſlow was ſent down "with the Queen's Serjeant and Mr. Attorney General, to "ſhow for himſelf why he ſhould not be a member of this "Houſe, who alledging many weighty reaſons, as well for "his office of Solicitor, as for his Writ of Attendance in the "Upper Houſe, was nevertheleſs adjudged to be a Member "of this Houſe." The election of Speaker having then proceeded, Mr. Onſlow was choſen.

The other inſtance of the like ſort referred to in 23 Eliz. in the caſe of Mr. Popham, was thus, as entered in the Journals. There being a vacancy of the Chair, when the Commons were about to proceed to the election of a Speaker, Mr. Treaſurer declared to the Houſe, that he and others had ſeen a Member of their Houſe, in the Higher Houſe, when the Houſe had been there to receive the Queen's anſwer of licence to chooſe a Speaker, and the Houſe, before proceeding to the election, ſent meſſengers to the Lords to demand the reſtitution of Mr. Popham, Solicitor-General, and Citizen for Briſtol. They received for anſwer from the Lords, "That their Lordſhips "had reſolved he ſhould be ſent down, the rather becauſe he

Sir Henry Hubbard the Attorney-General having ſat by connivance, in the manner above mentioned, in the Parliament 4to Jac. the queſtion was again brought into debate in the Parliament 12mo Jac. and it ſeems then to have been made a party queſtion with the Court. For the Houſe, loſing ſight of all principles, did not even pretend to go upon the only ground pointed out by the debate in the former Parliament, and by the precedents then referred to as to the Solicitor-General, namely, the Attorney-General's being an attendant of the Houſe of Lords, called thither by Writ: but they ſtrayed into objections taken from his office and ſituation as a Servant of the Crown,

" was a Member of this Houſe, and this Houſe poſſeſſed of " him before he was Solicitor, or had any place of atten- " dance in the Higher Houſe"—And Mr. Popham being reſtored accordingly, he was choſen Speaker.

There is another caſe related from D'Ewe's Journal, in the Parliament of 28 Eliz. (of which there are no Journals printed) of Mr. Egerton, Solicitor General, who was choſen Burgeſs for Reading, after he had been commanded by writ to attend in the Upper Houſe, and had attended there three days. The Commons demanded, that he might be diſmiſſed from farther attendance there, and come into their Houſe. But upon conſultation, and defence made by himſelf, the Lords retained him; and the main reaſon is mentioned to to have been, becauſe they were firſt poſſeſſed of him.

The Reſolution as to the *Serjeant*, in 18 Eliz. (16 Febr. 1575) is in theſe words—" On ſundry motions had, it is con- " cluded by this Houſe, that according unto the old pre- " cedents of this Houſe, Mr. Serjeant Geffrey being one of " the Knights returned for Suſſex, *many have voice or give* " *his attendance* in this Houſe as a Member of the ſame, " notwithſtanding his attendance in the Higher Houſe, as one " of the Queen's Serjeants for his council there, as the place " where he hath no voice, indeed nor is any Member of the " ſame."

Theſe Caſes illuſtrate what was ſaid in a former part, as to the diſtinction between *Compatibility of Situation*, and *Capacity of State*. To ſhow that there may be an incompatibility from ſituation of ſitting in the Houſe of Commons, when there is no *incapacity* in the proper ſenſe to be elected.

although

although in that reſpect the Attorney-General ſtood upon the ſame footing as the King's other Servants, particularly with the Solicitor-General, whoſe office was, in the debate, not improperly called a limb of the Attorney-General's: They talk'd of there being no precedent for the choice of an Attorney, as if it required a precedent for any man to be choſen of *common right*, when under no legal diſability: They ſpoke of Privy Councellors not having antiently been choſen, though it was admitted, they had then got ſuch a continuance, that they muſt remain: And after ranging over ſuch wild ground as that, "Perplexed (as ſome of the Members expreſſed themſelves) in reſpect of the conſequence, in reſpect of the privileges of the Houſe, and ſatisfaction of his Majeſty;" they came at laſt to a ſtrange, illegal, and unparliamentary compromiſe, rather than a determination, "*reſolving*, that the Attorney-General ſhould, for that Parliament, remain of the Houſe." And "That no Attorney-General ſhould, after that Parliament, ſerve as a Member of the Houſe."

Such a determination, if it can be called one, was the child of mere caprice. For if the Attorney-General was really incapable of being elected or ſitting, the Houſe had no more right to retain him for *that* Parliament, than they had to call into the Houſe any perſon who was not choſen a Member: And if he was not diſabled, they had no right to reſolve, that he ſhould be excluded from any Parliament. Such an attempt to mutilate the Houſe, is well cenſured in the firm expreſſion of a Member in one of the debates upon the ſubject, who ſaid, "he would rather part with a joint of his hand, than loſe any part of that politick body whereof he was a member." But to pretend to exclude him from a future Parliament, was only

weightning the abſurdity of the proceeding, as it has not, at any rate, in their power to bind a future Houſe of Commons by any ſuch reſolution.

Thus, however, the buſineſs ended at that time; and in the Parliament 18 Jac. it was reported from the Committee of Elections as follows; (7th Feb. 1620) "for the Attorney-General, now in the "Lords Houſe, *becauſe by his Majeſty's allowance*, "an order laſt meeting againſt any Attorney-Ge-"neral being after of this Houſe, thought fit a "new writ." And upon this report, it was in the Houſe *reſolved*, (8th Feb.) "that the order the laſt "meeting in Parliament, concerning the not ſerv-"ing the Attorney-General in this Houſe ſhall "ſtand." Then is added——"A new writ."

In the next reign, when the firſt Parliament of Charles I. met, there is the following entry, (9th Feb. 1625) "Mr. Speaker moveth, that Mr. At-"torney-General, returned for Grimſted, and "mentioneth the order, 12th Jac.

"The order to be brought and read to-morrow "morning, and then ordered to be taken forward "in the Houſe."

And 10th Feb. there is this ſhort entry—"A "new writ for choice of another burgeſs for the "borough of Eaſt-Ginſtead, in the room of Sir "Robert Heath, his Majeſty's Attorney-General, "according to the precedent of 12th Jac."

The very reaſon for which the Writer of the *Conſiderations* gave a *Go-bye* to this caſe of the Attorney-General, at the inſtant he was inliſting it into his ſervice in the dark, made it proper for us to ſtate it fully: And it is no wonder he choſe to avoid the particulars of the caſe, as it is ſo very notable a ſample of the *Law of Parliament*, in his notion of it, that the caſe furniſhes.

Every body knows, that notwithſtanding the Reſolution incapacity laid upon the Attorney-Ge-

neral, or the *ſpecial order* by which that *office* was excluded the Houſe of Commons *in futuro*, at the very ſame time the *perſon* who held it, was allowed to ſit *de præſenti*, it is now, and has for a century paſt been the Law of Parliament, now confirmed by conſtant poſſeſſion, and become part of the conſtitution of the Houſe of Commons, that the Attorney-General may ſit in it. And the importance of having that great officer of the crown there, which was probably never more felt than in Charles the IIt's Parliament, which turned him out, in compliance with the ſpecial order of 12 Jac. is now ſo well underſtood, that we hear no more of a writ of attendance to call him into the Upper Houſe, nor has any queſtion been made as to his eligibility, ſince the Reſtoration.

With regard to the caſe of heirs apparent of Peers, which is alſo mentioned in a *ſide-way*, by the Writer of the *Conſiderations*, it was no wonder, that a queſtion was made of it, when the firſt inſtance occurred, upon the occaſion of a younger ſon of a noble family, then a Member of the Houſe of Commons, becoming, by the death of his elder brother, the heir apparent of the peerage, as before that time, no eldeſt ſon of a Peer had been choſen a Member of Parliament; which, if not a tacit Law of incapacity, was at leaſt a reaſonable ground of doubt. But the queſtion having been once determined, in the caſe of a ſon of the Houſe of Bedford, and the determination not many years after repeated upon a like inſtance occurring in the ſame family, under the very ſame circumſtances, there it reſted; and by a conſtant poſitive poſſeſſion for above 200 years, it has become the undoubted Law of Parliament, that the eldeſt ſon of a Peer of England, may be of the Houſe of Commons.

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The determination at the firſt, was not without it's legal ground, however good reaſon there was to doubt from the non uſe of the right, which very naturally created a preſumption of Law againſt it; for it has been held by the Lawyers, that "whoſoever is not a Lord of Parliament, and of "the Lords Houſe, is of the Houſe of Commons, "either by perſon or by repreſentation, partly *ex "augmentative*, and partly repreſentative." That doctrine was recognized in the debate upon the queſtion as to the Attorney-General, in which it was affirmed, that every man is either in the Houſe of Lords, or in the Houſe of Commons.

The Author of the *Caſe* has added to the liſt of his Friend, the Writer of the *Conſiderations*, the *Judges*, as a claſs of perſons *not eligible* by *Reſolutions* of the Houſe of Commons. But he might almoſt as well have mentioned *Biſhops*. For no body is ignorant, that it is of the very Being and Conſtitution of Parliament, and conſequently, that it is part of the moſt fundamental Law of Parliament, that the Twelve Judges of England ſit in the Upper Houſe, as *Aſſiſtants* to the Lords in their judicature, all writs of error being to be tried in the Higher Houſe of Parliament. And the Judges are not like the Attorney and Sollicitor-General, and the Serjeants and other *Attendants*, who *may* be called by writ to attend, but may be diſpenſed with. The Judges *muſt* have their writ, and muſt be in the Houſe of Lords, where they neceſſarily have their places on the wool-ſacks, to give their opinion in matters of Law, when called upon, and to examine petitions and prepare bills, as much as the Lord Chancellor or Lord Keeper of the Great Seal muſt be there to aſſiſt as Speaker of the Houſe, though he ſhould happen not to be a Peer.

But it is only the twelve Judges of the courts in Weſtminſter-Hall, that have places in the Houſe of

of Lords; and therefore all other Judges of the courts of Civil Law, and the Chancellor of the Dutchy, who by office do not belong to the Houſe of Lords, may be, and uſually are, in the Houſe of Commons. And ſince the union, it required a ſpecial Act of Parliament to incapacitate the Judges of the ſupreme courts in Scotland, to be elected Members of the Houſe of Commons, becauſe they were not officially, or by writ called to attend as aſſiſtants in the Houſe of Lords, and had no place there.

The Author of the *Caſe* therefore might, with equal reaſon, have produced from the Journals, an order for a new writ, in room of one called up to the Higher Houſe as a Peer, to prove that Peers cannot ſit in the Houſe of Commons, as he cites orders of the like ſort, as to perſons appointed Judges, to prove that they are *not eligible only by Reſolutions* of the Houſe of Commons.

The Author of the *Caſe*, however, totally miſtakes the real meaning of the two entries he extracts from the Journals, as to judges, the firſt of which he does not cite fully, and conſequently not fairly. 28th June, 1604, Sir Edward Hobbes bolts out a doubt to be reſolved—— "Whether if a *Member* "*of this Houſe* be called to the place of a Judge, "or other Attendance above *during the time of* "*Parliament*, he ought to *have Place in the Higher* "*Houſe*," or, (which words our Author omits) "ſit here during the ſame Parliament." The meaning of which, as I conceive, was not, whether it was compatible for one of the Judges to ſit in the Houſe of Commons, but whether the Houſe could *return* a Member they were in actual poſſeſſion of, and keep him from being called up by writ to aſſiſt as a Judge in the other Houſe, the very ſame queſtion, which was, in ſome degree, tried with regard to Members of the Houſe of Commons

mons appointed to the office of Sollicitor General, in the inſtances which have been mentioned, when the perſon being antecedently a Member, was reclaimed from the Lords by the Commons.

So in the entry from the Journals, cited by the Author of the Caſe, of two Members, one appointed Chief Baron, and the other a King's Serjeant, the queſtion ſtated was expreſsly—— "If "the Houſe ſhould *recal* their own Members?" and it was reſolved in the negative. The reaſon was very obvious; for though a Soliciter-General, whoſe office did not neceſſarily make him an *attendant*, and did not at all make him an *Aſſiſtant* in the Houſe of Lords, might be re-demanded, when the Houſe of Commons was firſt in poſſeſſion of him, the Houſe of Commons could not require a Member who was appointed a Judge, to be reſtored, no more than they could demand back a Commoner created a Peer. The office of a Judge neceſſarily conſtituting a relation to the Houſe of Lords

In the very Entry in the Journal referred to on this occaſion, the diſtinction was taken notice of, for the words of the Report of the Committee are, "Serjeant Snigg, Lord Chief Baron, attendants as *Judges* in the Higher Houſe, not to "ſerve here——if a Serjeant to ſerve here." And the old Reſolution above quoted as to Serjeant Geffrey in 18 Eliz. ſeems to have been calculated to preſerve an option in the Houſe of Commons, to admit or exclude from their Houſe thoſe lower attendants of the Houſe of Lords, who might, or might not be there, and who, by their office, were not to give even an opinion in matters of Law in that Houſe. It is clearly therefore a mere miſunderſtanding of the Journals, and a forgetting of the very Conſtitution of the Houſe of Lords, which has led the Author of the *Caſe* to

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rank, *Judges* in *general* too, as if he meant *all* Judges, in his imaginary claſſes of perſons, not eligible by Reſolutions of the Houſe of Commons.

Another additional claſs, reckoned up by the Author of the *Caſe*, and alſo barely mentioned by the Writer of the *Conſiderations* among his *Supernumeraries*, are the eldeſt ſons of Scotch Peers. But the Gentlemen are alſo equally unfortunate, in this authority for their doctrine. For not merely to ſay, which would be enough, that the determination of the Britiſh Houſe of Commons, by which the eldeſt Sons of the Peers of Scotland were adjudged to be incapable of ſitting in the Houſe of Commons, expreſsly makes the *Law of the Land* the ground and foundation of the deciſion, and the ſole one: I ſay, beſides this, it happens really to be an incapacity by ſtatute, and a ſtatute of the moſt ſolemn kind, being in conſequence of an Article of the Union.

The words of the Motion and Queſtion put upon this ſubject were, "That the eldeſt ſons of the "Peers of Scotland *were* capable by the *Laws of* "*Scotland*, at the time of the Union, to *elect* or *be* "*elected*, as Commiſſioners for Shires or Boroughs "to the *Parliament of Scotland*; and *therefore* are "capable to elect or be elected to repreſent any "Shire or Borough in Scotland, to ſit in the Houſe "of Commons of Great-Britain."——It paſſed in the Negative.

Now it will not be diſputed but the Laws of Scotland, at the time of the Union, were the *Law of the Land*, in this matter, as to that part of the united kingdom: And theſe were Laws which the Act for the Union had confirmed, and indeed, made unalterable. For by an article of the Union, it is expreſsly declared, (and upon that the Negative to the above motion was founded) "That none "ſhall be capable of *electing*, or of being *elected*

" for Scotland to the Parliament of Great-Britain, " but ſuch as by the Laws of Scotland, at that " time were capable."

It is to be obſerved, that the incapacity goes to *electing*, as well as being *elected*, which of itſelf takes it totally out of the Line of theſe Gentlemens doctrine as to diſability. But another thing does it no leſs, and that is, that the incapacity is confined to the repreſentation of Scotland: For which reaſon, eldeſt Sons of Scotch Peers do now ſit in the Houſe of Commons when choſen in England, and always have done ſince the Union. So that they are by no means under an incapacity, or ineligible in our Author's ſenſe of the word.

The Author of the *Caſe* deſcends to individuals as not eligible by Reſolution of the Houſe of Commons; meaning, we ſuppoſe, to give an inſtance in proof of his poſition, that the Houſe have " ad- " judged Perſons incapable of being elected from " the *particular circumſtances of the Caſe, and upon* " *general principles of conſtitutional policy.*" He quotes the Caſe of Mr. Montague, againſt whom, upon proof of Bribery, in one of his Elections for Stockbridge, (not when he was choſen when in execution) it was reſolved that it was a void Election, and " that Mr. Montague be diſabled from " being elected a Burgeſs to ſerve in this *preſent* " Parliament for the *Borough of Stockbridge.*"

This, however, is an inſtance full as little to our Author's purpoſe as any of the others. For the inelegibility is confined to his repreſenting the Borough of Stockbridge in that Parliament, for procuring his being elected into which he had there practiſed the bribery. The Reſolution therefore is no more than determining that bribery ſhould not be allowed to have its effect: And if this is not a legal determination, and as ſtrictly conformable to, and founded on the *Law the Land*,

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as fifty Acts of Parliament could make it to be, *Jus publicum vanum eſt.*

I imagine no Law in the world can be ſo abſurd as to ſecure a convicted Thief in the poſſeſſion of the ſtolen goods: and from that, it does not differ one *iota* in Law, Senſe, Reaſon or Juſtice, if the Houſe of Commons, after declaring an Election void for bribery, could not hinder the corruptor from reaping the fruits of the *ſame* bribery at the new Election, neceſſarily to follow upon the adjudication declaring the former void. I apprehend the Reſolution againſt Mr. Montague, is, is in the ſtricteſt ſenſe a judicial ſentence founded in Law, and, by neceſſary implication of Law, ſpringing out of the nature of the Caſe, as much as *inteſtibility* neceſſary follows a conviction of perjury, or a judgment that a Knight of the Poſt ſhall not be received as a witneſs, which any Court of Law not only may, but muſt decree to be according to Law.

Our Author, however, to have been perfectly fair, ſhould, when he quoted this diſabling Reſolution, as he would call it, alſo have told us, that it was warranted by repeated general Reſolutions of the Houſe of Commons, to be found in the Journals from the 29 Charles IId. when it was firſt "reſolved, and ordered to be an inſtruction to the Committee of Elections, and to be from time to time entered amongſt the ſtanding powers given by the Houſe of Commons to the ſaid Committee, that certain male practices which are thereby declared to be bribery, ſhould be a ſufficient ground for making an Election void, as to the Perſon offending, and to *render him incapable to ſit in Parliament* by ſuch Election." Such a reſolution, I apprehend, was perfectly within the powers of the Houſe of Commons, and of ſufficient authority to bind all *Caſes* within it, not only as a fit and

legal order of judicial proceeding, but as a juſt and neceſſary Regulation for preſerving the purity and freedom of Elections, which by the Conſtitution are the peculiar Charge of the Houſe of Commons, as immediately affecting itſelf, and indiſpenſible for effecting the ends of juſtice in all determinations thereupon. And to give the Reſolution perpetual force, independent of the will or inclinations of any Houſe of Commons, it was after enacted by the clauſe in the Statute of the 7th King William to the ſame effect, before mentioned.

The only other *Reſolutions* mentioned by the Author of the *Caſe*, are ſuch as give effect to, and merely are executive of particular ſtatutes by which diſabilities are introduced and expreſsly enacted. I know not with what view he ſwelled his Catalogue with them. Neither do I underſtand the reaſon of his citing the Orders in 1606, for new Writs in room of the Members appointed Treaſurer at War in Ireland, and Chief Baron there, whoſe names were contained in the note before mentioned, ſent from the Chancellor to the Speaker, of Perſons diſpoſed of by his Majeſty in ſpecial Services, as to whom he deſired to know the pleaſure of the Houſe, whether Writs were to be iſſued for Elections in their ſtead.

Theſe Caſes have nothing to do with the preſent Queſtion; they bear no relation to diſability or incapacity to be choſen, the orders for new Writs were iſſued in thoſe Caſes in the ordinary courſe of the proceedings of the Houſe, for preſerving the repreſentation of the People full, upon the juſt principle mentioned and maintained in the Houſe in thoſe days, perhaps with more care than in later times, that the *End of Parliaments was to have thoſe preſent that did repreſent.* Not ſeeing, therefore, of what influence ſuch ſort of Caſes are upon the preſent

ſent Argument, it would be but fruitleſs to purſue them with any particular obſervations.

Thus have I travelled with both our Authors through all their *Claſſes* and *Caſes*, and I perſuade myſelf, it will not appear, that there is among them all, one Reſolution of the Houſe of Commons *ſtanding in force at this day*, (not even the *Special Order* as to the Attorney General excepted,) *diſabling* any man from ſitting in Parliament, or of effect to incapacitate or render ineligible any perſon or order of men *againſt the Law of the Land*, or in *contradiction to the Common Right of the Subject*.

After all, I muſt, reſume the real Queſtion, and return to this, which, as was premiſed, I conceive to be the only true ſtate of the Argument; That whether the determinations of the Houſe of Commons with regard to any of theſe Claſſes, or at any one time or another have or have not been agreeable to Law, ſtill the Caſes do nothing leſs than prove it to be the *Law of Parliament*, that the Houſe of Commons has a right or power by its own Reſolution *ſingly*, to *incapacitate*, *diſable* or render *ineligible*, either Individuals, or Claſſes of Men. For all the Caſes are mere determinations of the Houſe in the exerciſe of its judicature as to Elections and Returns: And that is as different from *making Diſabilities by Reſolutions*, as the Houſe of Lords determining a Cauſe upon a Writ of Error or Appeal, would be different from their reaſolving this or that to be Law, by virtue of their own judicial authority only.

In that Caſe, the Houſe of Lords, and in the other, the Houſe of Commons, would act a *legiſlative* inſtead of a *judicial* part, which is beyond their power: And their Reſolutions would not be *legal determinations*, but uſurpations of Legiſlature, which belongs to the united power of King, Lords

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and Commons. It would be an *Ordinance* inſtead of an *Act of Parliament*. The doctrine is dangerous and deteſtable. It tends to dethrone Juſtice, and to eſtabliſh Tyranny in her Seat. If it does not ſtorm, it is a treacherous ſurrender of the very Citadel of Liberty.—To maintain ſuch doctrine, is to inveſt the Houſe of Commons with a power deſtructive of the Conſtitution, repugnant to the Law of Parliament, and that overthrows the Rights of the People.

I cannot, however, expreſs myſelf with more force than the Commons of England in Parliament aſſembled, have, to the immortal honour of the Houſe of Commons, done upon the very point. I ſhall therefore take the liberty to finiſh this long head with the words of the Repreſentatives of the People of England in the famous conferences in 1689 with the Lords, upon the Amendments propoſed by their Lordſhips to the Bill for reverſing the cruel, arbitrary and illegal judgments of the Court of King's Bench, againſt Titus Oates, which had been affirmed by a decree of the Houſe of Lords.

The Commons told the Lords, "That by taking upon them to affirm ſuch judgments as "theſe, which the Lords themſelves agreed to be "erroneous, they had, in a manner, taken the "Law into their hands."

"That this *arbitrary* power in the Lords *judi-* "*cature* was a *new diſcovery*, and, if it had been "underſtood in former times would have been un- "a very expeditious way of *altering the Law* upon "ſeveral occaſions."

That "the Lords as a *Court of Judicature* were as "ſtrictly tied to give judgment according to Law, "as any inferior Court whatſoever:" That "They "muſt not proceed upon *Conſiderations* of conve- "nience: But *that* judgment of the Lords was a-

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" greed to be given, not according to Law but " according to an opinion which their Lordſhips " had conceived of the party :——inſtead of cor- " recting the acknowledged errors of the Judg- " ments in the King's Bench, they affirm them; " and ſo *change the Law*, which ought to be the " *certain and ſteady Rule of Government*, into the " ARBITRARY RESOLUTIONS of that Houſe.—"

" That the Lords—did ſeem to have inverted " the ſeveral methods of proceedings in their diſ- " tinct capacities."

" In their *judicature*, where they ought to act by " *the ſtrict Rules of Law*, they proceed according " to a ſuppoſed convenience in their *legiſlative* ca- " pacity, where there is a latitude of proceeding " according to a moral certainty and convenience, " a ſingle expreſſion—though inſerted upon juſt " grounds will not be allowed."

In a ſecond conference the Commons thus ex- preſſed themſelves,

—— " For your Lordſhips to *aſſume* a *diſcreti-* " *onary power* to affirm a judgment, though at the " ſame time you agree it to be erroneous, is to " *aſſume* a power to *make Law*, inſtead of *judging* " *according to the Rules of Law.*"

" It is recorded" (ſaid the Commons) " to " the honour of your noble Anceſtors, that they " declared they would not change the Laws: And " the Commons hope you will purſue their ſteps, " and not, by affirming erroneous judgments, go " about to *make that Law which was not ſo before*; " and by inſiſting upon collateral terms, before " you will reverſe thoſe judgments in the legiſla- " tive way, *take to yourſelves*, in effect, the *whole* " *power of the legiſlature:* which is not only to " *change the* Law, but to *ſubvert* the CONSTITU- " TION OF THE GOVERNMENT."——

Such was the doctrine of the REVOLUTION

HOUSE OF COMMONS, in ſupport of the LAWS OF ENGLAND, and the RIGHTS OF THE PEOPLE OF ENGLAND. If I could but catch a ſpark of the fire of this Remonſtrance, I ſhould, with ſome ſpirit, finiſh theſe reflections, when, to compleat the plan I propoſed, I am now come to the

VIth. And laſt general Head, which I promiſed to beſtow upon ſhewing, yet further, the real importance of the Queſtion which has been treated, by pointing out the danger of the Propoſitions, which I hope have, in the Argument, been proved to be erroneous. And

Firſt, in the *penal* incapacity, by *implication* ariſing from expulſion, there is this ſpecific danger, that it muſt, from the very nature of the thing, be liable to be made an occaſional Engine of Tyranny to proſcribe particular Members of Parliament, and garble a Houſe of Commons.

Such was the uſe of expulſion and diſability in the Parliament of 1640. That the expulſion of Sir Robert Walpole, with the incapacity adjudged againſt him, was uſed for this purpoſe, no Whig can deny. This circumſtance alone merited very ſerious conſideration before ſuch a ſolitary authority, ſuch a malignant ſentence, had been uſed as a precedent, or purſued as an example. The friends of the Houſe of Hanover uſually look back to the proceedings of Queen Anne's Tory Parliament, only to remember the great deliverance wrought by providence for this Country, in fruſtrating the counſels of thoſe Men, whoſe machinations centered in the defeat of the Proteſtant Succeſſion, and reſtoring the Pretender.

This danger cannot exiſt, if the Law of the Land is the certain and ſteady rule of incapacity, unleſs with ſuch a Houſe of Commons as can venture to ſet the Law at defiance, and laugh at the Conſtitution itſelf. But ſo long as expulſions them-

themſelves are arbitrary, an incapacity implied in them, muſt be ſo too. And nothing is more arbitrary than expulſion, becauſe there is no Law or rule defining or limitting the cauſes of it.

Such a ſort of incapacity can never be the inſtrument of equal and indifferent juſtice, and therefore muſt be an evil of a moſt pernicious tendency, moſt repugnant to the Spirit of a Free Government, and adverſe to the genius of this conſtitution. It is the glory of it, that men know the Law by which they are to be judged; that by the Law only the guilty are puniſhed, as well as the innocent protected: And that in every ſituation, juſtice is adminiſtered by the golden and ſtraight mete-wand of the Law, as Lord Coke calls it, and does not bend to the uncertain and crooked cord of diſcretion.

This implied incapacity is abſolutely a *præmunire* without ſtatute and without judgment, which puts every Member of Parliament out of the protection of the Law for the nobleſt privilege, and deprives the Electors of England of their higheſt Franchiſe. For theſe are made to depend upon the mere pleaſure of a Majority of the Houſe of Commons, which may be their caprice, their malice, party heat, oppoſition of opinion and objects:——And with all theſe, has at ſome times been a deſign to ſubvert the conſtitution.

It is the brilliancy of civil policy, and the luſtre of a well tempered conſtitution, that there is a wiſe mixture of mutual checks to prevent the evils to which the ſubjects are expoſed, where every thing is reſolved into the mere will of Governors. In England the Judge checks the Jury, the Jury controuls the Judge, and the Law rules both. In that Judicature by which expulſion is inflicted, there is no check at all, if incapacity is annexed to it; which is rather laying the reins upon the neck

of Power in too dangerous a manner. If Expulſion is left without Incapacity, the power of Re-election is a check, becauſe an exceſs in the Judicature would prove fruitleſs, if it was fooliſh or wicked; and the Member who did not deſerve to be expelled, return in triumph over Partiality and Precipitance.

There is at leaſt a ſhadow of ſafety againſt Incapacity by Reſolutions diſabling claſſes of Men, becauſe of the number they affect; as whole bodies cannot well be the objects of malicious Reſentment, or ſuffer for the ſake of one that is. But a diſabling Expulſion that can take one, and leave another, and do execution juſt as it is levelled, is capable of being converted into a downright *Oſtraciſm*, and may lay waſte by piece-meal, till it effect a total deſolation of Virtue and Patriotiſm, as it did in the Houſe of Commons of 1640.

Nothing can better ſhow this danger than the Expulſions of that Parliament, which proceeded from the ſpirit and party of the times.

Sir Edward Deering, we have ſeen, was expelled for publiſhing Speeches in favour of the Conſtitution.

Mr. Holles was expelled for making a Speech, of which it is mentioned, that it was with great ſtrength of reaſon and courage, but more heat than the times could bear. He was afterwards, indeed, reſtored by the favour of the Houſe; but the Reſtitution, which was as illegal, as the Expulſion was outrageous, only illuminates the danger of unbridled Power in critical ſeaſons.

Mr. Taylor was expelled upon the evidence of a Paper, containing words alledged to have been ſpoken by him at Windſor, as to the Bill againſt Lord Strafford, and he was impriſoned till he ſhould make a public Recantation at Windſor. This, and

and Sir Edward Deering's Caſe, are both among the Gentlemen's Precedents.

A Member was ſuſpended for a Seſſion for ſome words, which, it is ſaid, gave offence; that is, which the Majority did not like to hear.

Two Members were ſent to the Tower for bringing in Candles againſt the deſire of the Houſe, when, very probably, their Proceedings ſuited the darkneſs. For the ſame, or for a leſs Offence, they might have been expelled, conſequently incapacitated, if that be the Law of Expulſion.

Nor is it to the Parliament of 1640, that ſuch Expulſions were peculiar.

In the 18th of James the Firſt, a Member was expelled, becauſe he ſaid ſomething on a Bill, which (it is ſaid) *ſeemed* to reflect on the perſon who preſented it, as ſavouring of a Puritan and factious Spirit, and he was told his judgment was very merciful, for that the Houſe might, for ſo exorbitant an Offence, have impriſoned and farther puniſhed him.

But, to cut the matter ſhort, I would aſk but one Queſtion. Can any man be found bold enough to ſtand up in his Place, fortified with all the Precedents which have been collected, and with the doctrine by which they have been ſupported, and move for a Bill, that every Perſon expelled ſhall be incapable of being re-elected into the ſame Parliament? I don't believe one will be found. Yet if it ought to be Law, why not enact it? *Si quis legem ſanciat, pœnas indicat.* Dark, doubtful, and diſputed Laws, if any thing of that ſort deſerve the name, are one of the greateſt evils that can affect a country, eſpecially in criminal matters; becauſe they are the moſt horrible means of tyranny and oppreſſion. The Reſolutions againſt Bribery, for preventing the corruption of Parliaments by accepting Offices, were afterwards enact-

ed by Statutes. Even to render effectual the Law of the Land as to Minors, a Clauſe was enacted with penalties. And if this Law of Parliament-Incapacity, as the Gentlemen call it, be ſo very reaſonable and ſalutary, why grudge an Act of Parliament upon it to remove doubts, and let every man know what he is liable to. It will not be acquieſced under, while it is nothing but the *Dictum* of Doctors and Profeſſors, the *ravings* of Journaliſts and *Precedent-men*, the Mandate of a *Miniſter*, the progeny of an *Ordinance*, or the brood of a *Reſolution*. But,

Secondly, The other Incapacity by *Reſolution*, which though not penal, is as *privative* as the former, in the way the Gentlemen conſtrue it, as a direct Diſability inſtead of a declaration of a want of legal Capacity, or Incompatibility; this alſo is dangerous in the higheſt degree, both in reſpect of the extent to which, according to the doctrine upon which it is built, it may go, and in reſpect of the Power by which it is produced.

The Gentlemen have not been pleaſed to mark out any limits to this extraordinary Power of diſqualifying, or declaring ineligible, as they term it, by Reſolutions; nor indeed can I ſee how any limits can conſiſt with their doctrine of an abſolute and uncontroulable Power in the Houſe of Commons to make ſuch diſqualifying Reſolutions. This doctrine ſo ſets at naught all the Principles of the Conſtitution, that it is impoſſible to ſay to what extent the Power may not go. If the Law of the Land were the rule of theſe Reſolutions, and they were merely *declaratory*, as we have argued and have endeavoured to prove from all the Caſes, the boundary would be known; but then there would be an end of the doctrine of In-eligibility *ſingly* by Reſolution.

If

If ſuch an abſolute power of *reſolving* Incapacities is eſtabliſhed, the old Ordinance of the Lords for excluding Lawyers, may again come into the Writs, for the ſake of ſome Lawyer who does not always chooſe to be the Tool of a Court, or the Slave of a Miniſter, or his Minion, with an exception only of Lawyers in the King's ſervice.

If there is a troubleſome Alderman of London, whoſe ſituation and diſpoſition renders it impoſſible to take him off, *reſolve* that no Magiſtrate of the Metropolis is eligible; and if a pretence were neceſſary, (which abſolute Power diſdains,) give for a reaſon that he is to attend the Functions of his Office.

Does the commercial world furniſh ſturdy Patriots, why not *reſolve* that Merchants cannot be choſen, who have an intereſt always to oppoſe the laying on of Duties.

Is it inconvenient to hear the Din of the Colonies, declare that no man born in America can ſit in the Houſe of Commons.

Becauſe the intereſts of England and Ireland ſometimes jar, exclude all who have eſtates in Ireland, or are Members of either Houſe of Parliament there.

If a phyſician ſhould be choſen, illuſtrious enough to be proſcribed, as Doctor Lucas was in Ireland, where he is now the Patriot Repreſentative of the Capital, nothing more is neceſſary than a *Reſolution*, that the Medical Faculty are incapable of being elected.

All that can be ſaid is, that this would be, as the Commons expreſſed themſelves in the conferences which have been cited, a moſt expeditious method of changing the Law. It is indeed *celeri certare ſagitta.* It might, however, be convenient, if this Conſtitution were to be adopted, to leave a diſpenſing power with the King, or his Miniſters, and then

then the Lord Chamberlain might licence Members of Parliaments as he does Plays.

If this Reſolution-Law be the Law of Parliament, there is not ſo far as I can ſee, one Claſs of men, one Order or Profeſſion, who are, for an inſtant, protected by the Law of the Land, or the Conſtitution, againſt a Reſolution rendering them ineligible, if ſome unlucky man ſhall ever happen to be of importance enough to call forth this feathered arrow to make rid of him.

The Author of the *Caſe* carries the doctrine even to individuals, and he has a very comprehenſive rule for the application of it, viz. the particular circumſtances of the Caſe, and general principles of conſtitutional policy. In ſome future time it may be a particular enough circumſtance of a Caſe, that a man ſtumbled upon a particular Vote in ſome queſtion; and it may be a very good principle of policy, that another has not given ſome teſt of his attachment to the Miniſter.

It was the conſtitutional learning of James the Firſt, that moſt eminent Royal Profeſſor of Deſpotiſm, that the Rights and Privileges of Parliament, were mere indulgences of the Crown, reſumable by the Sovereign. Is it the leſſon of this day, that the Houſe of Commons may, by Reſolutions, reſume the people's Rights of Election, and reduce them to the ſtate of a Conge de lire. For to what elſe does the doctrine of theſe Gentlemen go? Do they imagine that it will be endured, or that the people of England are already fit to receive it. Poiſon may be a medicine, but never in any quantity; and it is always dangerous when adminiſtered by a Fool. It is not even ſafe for the Fool himſelf.

So much for the danger of this ſecond ſort of Incapacity in the extent of it. Now as to the danger of the Power by which it is produced—A Reſolution of the Houſe of Commons—An Ordi-

nance—

nance—Not a ſelf-denying, but an arrogating and aſſuming Ordinance—A diſabling Ordinance.

Ordinance, is a *note of Uſurpation*, and will remain branded with its proper *ſtigma*, as long as any ſenſe of the value of this Conſtitution continues. For the danger of it, we have but to look to the Proceedings of the Parliament of 1640, which *reſolved* away the regal Government of theſe Kingdoms.

But, without ſuppoſing ſuch an extremity, if this doctrine of the Power of Reſolutions takes root, poſterity, for aught any body can inſure to the contrary, may ſee the Negative of the Crown expelled out of the Legiſlature by a Reſolution of the Houſe of Commons—Or a Reſolution, that the Lords muſt paſs all Bills by which the Commons grant aids to the Crown—Or a Reſolution, that no Commoner ſhall be made a Peer without conſent of the Houſe of Commons.

To come nearer our immediate Subject; upon ſuch a ſyſtem of Power in the Houſe of Commons, could any Reſolution be complained of, eſtabliſhing new Qualifications as well as Incapacities of Electors, or Elected, Elections being the object of the competent and excluſive Juriſdiction of the Houſe, in which they are ſubject to no appeal? May we not, for example, ſee a Reſolution copying after the Parliament 1640, that all Electors and Elected, ſhould take the Communion with the church of England, to exclude ſectaries, and no matter though it alſo cut off the forty five preſbyterian Repreſentatives for Scotland, if their conſciences ſhould happen to be very ſcrupulous?

The Author of the *Caſe* tells us, the Houſe of Commons have not ſaid, and he adds, God forbid they ever ſhould ſay, who ſhall be Elected; they have only declared by their Reſolutions, who by Law may not be Elected. What this Gentleman

and

and his Colleague *Writer*, mean by declaring Ineligibility *by Law*, we have fully explained from their own words. But no tranſition can be more eaſy than that from reſolving who may not be Elected, to Reſolutions who ſhall be Elected. And, indeed, Reſolutions extended to a convenient length, as to thoſe who may not be Elected, will at laſt pretty effectually determine who ſhall be Elected, by leaving none to be choſen but thoſe of certain Qualities or Deſcriptions, with the help of a liberal interpretation of the *Viri diſcretiores et majus idonei*, which the Writ commands to be Elected.

But the danger of this power does not reſt ſingly in it's being ſubverſive of the very frame of the Government as inveſting one Houſe of Parliament with the effect of legiſlative powers which is bad enough: It is no leſs dangerous in it's nature and in the manner and circumſtances of it's being exerciſed, than in it's principle and origin. For here, again, the unkindly ideas of *judicial* diſcretion neceſſarily preſent themſelves.

This arbitrary power of *judicial* reſolutions is not like abſolute government, which, in the hands of a wiſe Prince may be harmleſs, tho' ſo liable to miſchief, that no man of ſenſe would wiſh to ſee ſuch a form of Government eſtabliſhed, or to live under it. It is a diſcretionary power in judicial determinations, from which it ought, as much as in nature, to be excluded: And it is doubly dangerous as the diſcretion of a numerous body, not having the Pole Star of the Law to guide, or any rule as a compaſs to direct them. A diſcretion, ſo circumſtanced, is moſt likely to turn out often to be the wildeſt extravagance of men; the diſcretion of a multitude free of Rule and Law, being ſomething very much of the ſame caſt with the moderation of a mob.

But

But this diſcretion of arbitrary reſolutions we have ſeen very well characteriz'd and expoſed in the Commons Conferences upon Oates's Bill. And what was the conſequence of diſcretion being ſubſtituted in place of the Law of the Land, as the Rule of Trial, under the adminiſtration of juſtice by Empſon and Dudley? When they were hanged, the race of bad men did not totally fail. To what enormous extravagance of puniſhments did the diſcretion of the Court of King's Bench go, in the bloody reign of James II. when once the Judges had determined, that it was in the *diſcretion* of the Court for miſdemeanours at Common Law, to inflict what puniſhment they pleaſed, not extending to life or member. They inflicted puniſhments far worſe than death; which may be a Scare-crow for judicial diſcretion in all ages. This inſtance is alſo treated in the proper manner, in the above conferences of the Commons.

But it is needleſs, in this climate, to enlarge further upon the danger either of ordinances or of judicial diſcretion. The authority of ordinances or reſolutions of one Houſe of Parliament to make Law, or to declare to be Law, what never was Law before, ſtrikes at the foundation of the conſtitution. It deſtroys the equilibre of the Government, which exiſts in the ballancing of its different branches, and can only be preſerved by maintaining the poiſe.

Ætheris immenſi partem ſi preſſeris unam.
Sentiet axis onus.—

For the doctrine to be oppoſed to the power we are contending with, we may take it from King Charles I. in one of his ſpeeches at the concluſion of a ceſſion, though the ſpeech was made juſt after he had, inconſiſtently enough with his words, however conformable to his practice,

given a very bad anſwer to the Petition of Right. —" None of the Houſes of Parliament," (ſaid he) " joint or ſeparate, what new doctrines ſoever have been raiſed, have any power either to " make or declare a Law without my conſent." Which laſt words we have only to vary, when ſpeaking of one Houſe of Parliament, by ſubſtituting in place thereof theſe others " without the " conſent of the other two branches of the legiſ- " lature." The doctrine is ſo ſound, that it was eſtabliſhed by the Statute after the Reſtoration, which makes it a *præmunire* to affirm, that both or either of the Houſes of Parliament have any Legiſlative Authority without the King.

And for the danger of the doctrine we grapple with, I ſhall alſo cite words, which the ſame King was inſtructed to uſe on another occaſion, ſo appoſite, as almoſt to be prophetical of the preſent diſpute—" If (ſaid he) there ſhould be ſuch a ſecret " of the Law, which hath lain hid from the be- " ginning of the world to this time, and is now " diſcovered to take away the juſt legal Powers of " the King, we wiſh there may not be *ſome other* " *Secret* to be diſcovered, when they pleaſe, for the " *ruin and deſtruction of the* LIBERTY OF THE SUB- " JECT: for, no doubt, if the Votes of both Houſes " have any ſuch authority to make a new Law, it " hath the ſame authority to repeal the Old; and " then what will become of the long eſtabliſhed " Rights of the King and *Subject*, and particu- " larly of MAGNA CHARTA, will be eaſily diſco- " vered by the moſt ordinary underſtanding."

Thirdly, I cannot, after hearing ſo much of *Precedents*, forbear, upon this occaſion, to take notice of the danger of Precedents that trench upon the Conſtitution, which is ſo great, that they cannot be too carefully avoided, nor any pains be too much to reſiſt and repel them.

Preceden

Precedents are in their nature moſt prolifick, and therefore to be withſtood in their firſt beginnings. One eternally begets another, in an endleſs ſucceſſion. We need not here produce the teſtimoney of the Parliament 1640. The example of Sir Robert Walpole's expulſion and incapacity, is *now* ſufficient for our purpoſe.

Lord Coke ſays, "It is not almoſt credible to "foreſee, when any maxim or fundamental Law of "this Realm is altered, what dangerous Conſe-"quences do follow." And he is ſpeaking of alterations made in a conſtitutional way, by Act of Parliament, for he refers, for an example, to that ſtatute on which Empſon and Dudley founded their flagrant oppreſſions of the ſubject. Precedents of unconſtitutional power are yet more dreadfull, becauſe they are at once dangerous in their origin, and diſmal in their conſequences, the wildeſt and moſt extravagant, like illicit amours. But of all others, Precedents that eſtabliſh *principles* deſtructive of fundamental rights, are the moſt fatal; as they have a direct and immediate tendency to work a ſubverſion of the conſtitution, and reſemble the letting in of water, which, by running, enlarges it's own paſſage, till it guſh into a torrent of devaſtation.

Mere acts of acknowledged violence, either by judicial or miniſterial power, can do little general harm, and are eaſily corrected, as we ſaw in the caſe of general warrants and ſeizure of papers, which no body undertook to juſtify with as many precedents as could fill the Office of a Secretary of State. But ſuffer miſchievous principles to ſettle, and they preſently become a part of the ſyſtem, incorporate with the conſtitution, and are interwoven in it's frame.

If, as an able writer obſerves, that great maxim of politicks were purſued by governours, ne-

ver to enter into meaſures to anſwer particular occaſions, without conſidering how far that ſtep, which their neceſſities may drive them into, can prove fatal and dangerous in its conſequences; I ſay, if this maxim were followed as it ought, we ſhould ſcarce ever find precedents eſtabliſhed which one time or other may be brought to juſtify the moſt abominable tranſactions, and to deſtroy the liberty of theſe kingdoms.

However, if Miniſters and Men in power will offend againſt the duty they owe to their country, it indiſpenſibly behoves every other man, in his ſtation and ſphere, whatever it may be, to reſiſt and defend againſt ſuch attempts. It is not ſo difficult to foreſee, as hard to prevent the conſequences, if perſons of weight and influence in the ſtate are induced, by cowardiſe or corruption, ſhamefully to give up the People's rights, and even to join in invading fundamentals, flattering themſelves, perhaps, that when they have, by their ſervile compliances, gained ſome preſent advantages to themſelves, it will then be time enough to redeem the common-wealth. It has been juſtly remarked, that ſome ſuch notions as theſe at firſt led Pompey to join in the meaſures of thoſe who intended to ſubvert the Roman liberties; and afterwards, when he repented and deſired to ſave his country, he found them grown too ſtrong, and himſelf too weak, to do any good.

There is another ſort of danger in precedents, and though it does not ſo properly belong to my argument, it is very fit to be conſidered by ſome folks. They ſhould recollect, what has been often obſerved, that vindictive precedents are generally found to be dangerous weapons, which carry a double edge, one for their contrivers, as well as another for the devoted ſacrifice; and ought therefore to be equally avoided, both in

policy

policy and humanity. Lord Coke mentions a notable inſtance of this ſort, in an Earl of Eſſex, who cauſed that abſurd Act of Parliament to be made for attainting people without hearing them; and was the firſt himſelf who ſuffered in conſequence of it, the perſon at whom it was aimed having eſcaped it's bloody edge.

Where virtue controuls perſonal reſentments, this is juſtly repreſented as the language of a true Patriot, "I hate this Man, and deſire to do him "a miſchief, but the Love of my Country has "greater power over me." And forbearance, ſometimes, is a very uſeful political rule. It is greatly praiſed in Philip of Macedon, and with this commendation of itſelf——that it was *ingens inſtrumentum ad tutelam regni.* It is alſo recorded, to the honour of the Romans, as a nation, that though the Carthaginians had committed *nefanda facinera* againſt them, both in peace, and during truces, yet they did not retaliate when they had opportunities, but rather ſtudied to do what was worthy of themſelves, than what might have been lawfully done to thoſe who had given them ſuch provocation. The example of Miltiades is no leſs worthy of imitation, as well as honour, as a part of whoſe character it is ſaid, *Amicior omnium libertati quam ſua dominationi fuit.*

In the fourth place. The danger of the propoſitions, the erroneouſneſs of which, we have endeavoured to prove, will appear, if we reflect upon the object, which is affected by the doctrine and principles againſt which we contend, and the conſequences which may follow them.

The object is the Right and Freedom of Election, the bulwark of our Liberties, the baſis of the Conſtitution. If theſe are hurt, the foundations are deſtroyed. They are the moſt important part of the privileges of the Houſe of Commons, becauſe

they

they are the moſt valuable of the privileges of all the Commons of England, and the defence of all the reſt. Therefore, as a Parliament-man ſaid in the debate, as to the Attorney-General, in 1614. "The Caſe of the Houſe has always been for their "privileges, but in nothing has their care more "appeared, than the preſervation of the right of "Election of the Members this Houſe."

Take away this unalterable and unalienable Right, and to borrow the words of a bold woman, the Counteſs of Arundel, in a ſpeech to Henry III. "Where are the Liberties of England ſo often reduced into writing, ſo often granted, and "ſo often redeemed." *Illo* jure *ablato non tam illum amiſiſſe quam cum illo omnia interiiſſe viderentur.* This is the Right for which we would ſurely wiſh to have the promiſe of Polyphemus to Ulyſſes, that it ſhould be the laſt to be devoured.

As to the conſequences of an invaſion of this Right;——Theſe are an illegal, unconſtitutional repreſentation, and may be the packing of a Parliament to the deſtruction of the kingdom. If in the election of Members of Parliament, a Minority is to be ſet up againſt a Majority, upon the ground of arbitrary and illegal incapacities, contrary to Common Right, Privilege, Property, and Conſtitution, under ſuch a Diſpenſation, are the mere *Caput Mortuum* of ſpeech.

But to ſpeak more fully on ſuch a ſubject, I chooſe to do it from the Annals of England. It is in our hiſtory, that Richard the II. in purſuit of his inſatiable luſt of arbitrary dominion, took every unconſtitutional method he could think of to procure a Parliament of his own abject creatures, by the help of ſuch ſlaves, to ſubdue their country to his tyrannical yoke. "And (continues the "Hiſtorian) if any were elected not agreeable to "him, *Sheriffs were ordered not to return them*, but

to

" to cauſe others to be choſen in their room. Be-
" ſides, *as the Houſe of Commons were the ſole Judges in the affair of Elections*, he was well aſſured,
" that ſuch a Parliament would confirm, *or* reject
" whom he pleaſed."

" It muſt not, (proceeds the Hiſtory) be thought
" very difficult for a King of England to execute
" ſuch a project. Experience has ſince confirmed,
" on numberleſs occaſions, that by the like ways,
" it is very poſſible to cauſe repreſentatives to be
" choſen devoted to the court. However, Hiſto-
" rians remark, that it was in this Parliament that
" ſuch practices were firſt uſed. But it muſt like-
" wiſe be added, that it was one of the principal
" cauſes of Richard's deſtruction. And indeed,
" (ſays this ſame Hiſtorian) *it is impoſſible that a*
" *nation can ſee their Liberties in the hands of men*
" *whom they have not themſelves freely choſen, with-*
" *out deſiring to be delivered from ſuch an oppreſſion.*"

The Parliament, ſo compoſed, was opened with a Speech, made by a Biſhop, to prove that the regal power was unlimitted, and that ſuch as endeavoured to bound it, deſerved the ſevereſt puniſhments. In conformity to that principle, which in *that* Parliament met with general approbation, were the proceedings of the Parliament which made a perfect maſſacre of the nation; for the account of which we refer to the Hiſtory.

" If, ſays Rapin, the Parliament of 1386, de-
" ſerved to be called the *Mercileſs*, I know no
" name odious enough for this. This aſſembly
" made no ſcruple to ſacrifice to the paſſions of the
" King and his Miniſters, *the moſt diſtinguiſhed*
" *Lords* of the kingdom, as well as the LIBER-
" TIES AND PRIVILEGES OF THE PEOPLE——
" They approved, as conformable to Law, the
" Opinions, for which nine years before, the
" Judges were condemned ——" And the
" Judges who attended during the ſitting

" of

" of this Parliament, *decided*, that when the King " propoſed any articles to be debated in Parlia- " ment, it was High Treaſon to bring in others " before the King's were diſpatched."

The whole ended in one of the ſtrangeſt things to be found in the whole Hiſtory of England,— An Act of Parliament, by which the whole power of the nation was devolved to the King, twelve Peers, and ſix Commoners.

The Hiſtorian who relates theſe facts, could not help *ſtaying here*, as he expreſſes himſelf, a moment to reflect on the Conſtitution of the Engliſh Government: And while we have his Remarks, we need not offer any of ours on this occaſion, " It " is certain, (ſays he) the inſtitution of Parliaments " is very advantageous to the kingdom, being the " only SUPPORT OF THE LIBERTIES OF THE PEO- " PLE, who without that, would have long ſince fal- " len into a fatal ſlavery. But on the other hand, it " cannot be denied, that theſe Aſſemblies become " ſome times very dangerous, when influenced by " popular Factions, or the cabals of an ambitious " Prince. Accordingly it has often happened, " that, inſtead of procuring the good of the Realm, " they have produced confuſion, and the ſubver- " ſion of the Laws."

He adds, " It may be farther obſerved, that " the violent method practiſed by Richard to at- " tain to arbitrary power, I mean, *forced Elections*, " and the Opinions of the Judges, was exactly " copied in our days, by one of his ſucceſſors, " who had, without doubt, the ſame intention. " But we may add, that the attempts of theſe two " Monarchs, ſerved only to promote their own " deſtruction, and that their deſigns came to the " ſame cataſtrophe."

Richard was depoſed, and this is one of the Articles on which the ſentence of depoſition is founded.——

ed.——" That although by Law and Cuſtom, the " *People ought to be free to chooſe* Knights to repre- " ſent them, to propound their grievances, and " provide remedies for them; yet the ſame King, " that he might obtain his own raſh will in Par- " liament, directed by writs often to the Sheriffs, " to ſend ſuch as he named, ſome of whom he " induced by favours, others by threats and ter- " rors, and others by bribes, to conſent to things " prejudicial to the Kingdom, and grievous to the " People."

Theſe things *were written for our inſtruction*, I ſhall not ſay—for the inſtruction of us *upon whom the* Ends of the Engliſh Conſtitution are come. But it is for us to judge, whether the proſpect we have of improvement in publick or private virtue in the ages to come, entitle us, in the preſent, to unbend the caution which paſt examples ſuggeſt to us, or to hide from our eyes, truths calculated to keep it alive, which are recorded in the faithful page of hiſtory.

I would obſerve, in the fifth place, upon this head,——That of all the dangers which can affect the Rights and Freedom of Election, none is comparable to that which may come from the Houſe of Commons, if that ſhould ever be packed, debauched, or corrupted to betray the Liberties of the People, as we have ſeen it was in the reign of Richard II. The Houſe of Commons is the *Salt of the* Conſtitution; but if the *Salt hath loſt it's ſavour, wherewithall ſhall the* Conſtitution be preſerved. Here, as a ſafe harbour, the Rights of Election, as the chief of the privileges of England, ought to be ſecure; but if *there* they are deſtroyed, it may be ſaid, as Cicero, ſpeaking of the battles of Syracuſe, ſays of the power and glory of the Athenians, *in hoc portu libertatis naufragium factum fuit.*

No doctrine, therefore, can be more alarming or dangerous, than that which tends to ſet the Houſe of Commons above the reſtraints of the Conſtitution, and to deliver them from the checks of all Law, in the exerciſe of their Right of determining Elections. If they are inveſted with ſuch an uncontrouled power in that Judicature, as is now contended for, a majority may, by means of illegal Deciſions, wild Expulſions, and unconſtitutional Incapacities, model the Houſe for any purpoſe, as was done in the time of Richard II. and in the Parliament of 1640. By ſuch doctrines, we renounce the protection of the Law, and the ſecurity of the Conſtitution, and deliver over our Liberties as a prey to the chance of things and fate of times: Or we lay a foundation for a treacherous ſurrender of them, if a Miniſter ſhould, in any future age, be found audacious enough to make the purchaſe, and profligate men ready to receive the price, *ſhould be appointed* by arbitrary deciſions to ſit in the place of Repreſentatives of the Peoples choice, ſufficient in number to conclude the infamous bargain, which Richard, and the Commons whom he ſet in Parliament, finiſhed and executed.

Far be it from me to ſay any thing to give the People a diſguſt to Parliaments. This is not my deſign, nor was it the deſign of thoſe who have ſaid, as it often has been in the beſt of times, and by the beſt of Patriots, and the ableſt of Statesmen, that if England ſhould ever be ruined, it would be by her Parliaments. On the contrary, we mean to ſignify that *there* lies our great ſecurity, but that we muſt keep up the Out-works, in order to preſerve the compleat ſtrength of the Fortification.

Human Nature cannot diſpenſe with curbs. They are not more neceſſary to maintain government, than they are to controul thoſe that do go-

vern. If we give up the checks by which the Conſtitution has reſtrained the Houſe of Commons, we endanger the Being of itſelf. For, if left without controul, in their judicature of Elections, they may deſtroy the Rights and Freedom of Election: And nothing but free Elections can ſecure to us a Houſe of Commons upon the principles of the Conſtitution, that is, a fair repreſentation of the Peoples free choice.

As we therefore value the ſecurity derived to the Conſtitution from the Houſe of Commons, we muſt aſſert the freedom of Elections, in order to preſerve, not the form only, but the ſubſtance of the inſtitution. If that will anſwer the end, we are ſure nothing elſe can prevent the corruption of Parliament. And with a corrupt Parliament there remains not only no ſecerity for our Liberties; but a Houſe of Commons debauched into ſubmiſſions to bad Miniſters, or meaſures inconſiſtent with Liberty, muſt demonſtrably be the ſureſt pledge, and in the end, with the greateſt eaſe, effect the firmeſt eſtabliſhment of the worſt ſort of tyranny. It would be a tyranny eſtabliſhed by Law, and apparently with the conſent of the People, their falſe Repreſentatives forging the chains they are to wear, and the ſhadow of Freedom which they exhibit, only more effectually deluding into a total loſs of the ſubſtance, and depriving of the means of retrieving it.

It is the obſervation of Machiavel, that where nothing but the appearance of freedom is preſerved, there the moſt ſevere ſervitude is always intended:—Of the truth of which obſervation ſome modern republicks are a proof. So mixed Governments, when degenerated, are the worſt enemies to Liberty, though they were the beſt device to preſerve it. From the time of Cinna, to to the attempts of Julius Cæſar, corruption, it is

 certain,

certain, had this effect in the degenerate Republic of Rome.

Tyrants that ſubſiſt by mere force, and where the will of a Monarch is the only Law of the Government, have few friends but men of the ſword. But where there is the figure of a free conſtitution, and the people ſeem to have a hand in making their own fetters, by the voice of ſomething in the ſhape of their Repreſentatives, the cowardly and corrupt are of the ſide of the tyranny. They participate in it, and are paid for ſupporting it, and therefore they uphold it over the better part of the Subjects.

No Government, as has been juſtly obſerved, was ever more abſolute, than when the Roman Emperors affected to rule by Law, with the form of an awed, a corrupted, and a ſubſervient Senate: And of this there was not an imperfect image in our own Country in the Reign of Henry the Eighth.

From theſe examples we may learn, that we ſhall not be ſecure againſt danger, merely by keeping up the antient form of our Government, as we received it from our Anceſtors. We muſt retain its virtue and eſſence. Let us therefore *contend earneſtly for the* conſtitution *once delivered to us*; and with its outward form, ſtudy to preſerve its inward vigour, and not ſuffer any of our Rights to been croached upon or invaded. Above all, *let us hold faſt* the rights and freedom of Election, upon which the whole depends: And let us execrate and abjure every doctrine that tends to enervate and endanger them, by ſetting up any unconſtitutional power, or pulling down any legal fence bounding the powers which the conſtitution has inſtituted.

Sixthly and laſtly, We might reckon among the dangers of the doctrine, in throwing down which, this

this diſcourſe has been employed, the difficulty of the remedy in caſe of any wrong being committed under the pretence of that unconſtitutional power, which the doctrine ſtrains hard to eſtabliſh; and the diſagreeable effects, which attempts to exert ſuch a power, may at any time produce, and which may grow more conſiderable if the pretenſions to it are perſiſted in, and the wrongs done not rectified.

Wherever there is an evil, the danger of it muſt be greater, as the remedy is more difficult. In proportion therefore to the value of the rights of Election, the evil of hurting them is increaſed by the difficulty of the remedy.

The Gentlemen themſelves, heedleſs of the conſequence, in caſe their reaſoning in ſupport of the power they contend for ſhould be found to fail, have aggravated the danger by inſiſting upon the circumſtances of the juriſdiction of the Houſe of Commons being excluſive and without appeal: Upon which, indeed, they have reſted their whole Argument for their power being uncontrouled by any reſtraint of Law. For the unavoidable conſequence is, that if a wrong be committed, the conteſt is directly and immediately between the people and their repreſentatives.

I am far from thinking, and I have, ſomewhere in theſe ſheets, ſaid, there is not a defect of a conſtitutional remedy for ſuch an evil. The hiſtory of Parliament, in inſtances to which we have referred, points out the remedy; and the daily Journal of the times rings it in our ears from all quarters of the kingdom. The remedy moſt undoubtedly is, an appeal to the juſt and legal prerogative of the Crown, with which the conſtitution, for the wiſeſt of purpoſes, has entruſted the Sovereign, and which is a fundamental of this government:

The

The Sovereign being thereby conſtituted the great umpire, not only between the two Houſes of Parliament, but alſo between the People and their parliamentary repreſentation.

The power of Prorogation or Diſſolution interpoſes in the caſe of a conteſt between the two Houſes: The negative in the Legiſlature veſted in the Crown, is a check upon their own Repreſentatives, in their legiſlative capacity.——And to that Prerogative the People may, and often have appealed by petition againſt bills paſſed by both Houſes of Parliament. If the People are injured by the Act of their own Repreſentatives, in the exerciſe of their more collateral, incident, and inferior Powers, the ſame Prerogative of the Crown may be appealed to for a Prorogation or Diſſolution, which remedy the Crown has often interpoſed of it's own accord.

This great Prerogative is a truſt for the People, and ſubſiſts for their ſecurity. For that very end and purpoſe it was by the original compact derived from them, together with the Crown in which it is lodged, as truly as the powers of their own Repreſentatives, are derived from them by Election. Both are alike fiduciary, to be exerciſed as all the Prerogatives of the Crown and all the powers of Parliament ought to be, for the commonweal of the Realm.

They are much miſtaken, who imagine the Prerogative of the Crown is a peculiar eſtate of the King, in which the People have no intereſt: for in this alſo, they have an inheritance as one of the guards and ſecurities of their Liberties: And the exerciſe of the Prerogative is not the perſonal Act of the Prince, but the function of the royal politick capacity of the Sovereign, the end of which is the ſame with that which is the end of all government; the good of the People: And all the

Acts

Acts of the Crown are guarded with conſtitutional checks and reſtraints, to ſecure the welfare of the Community in the exerciſe of them. It is not therefore the *legal* Prerogative of the Crown which is the object of dread, but uſurpations of power which aſſume that name, and tranſgreſs the bounds of the truſt repoſed in the ſupreme executive power.

Thus much we have ſaid, to aſſert the *reality* of the remedy of the evil in queſtion, and to explain the principles upon which it is eſtabliſhed as a ſolid foundation; which was perhaps more neceſſary than to point out the difficulty of the remedy, which is ſufficiently manifeſt from its very nature. Upon *that*, therefore, we ſhall only ſay, what every one muſt feel, that it is an awkard and diſagreeable ſituation for the People to be reduced to an appeal from their own Repreſentatives, whom they themſelves have choſen to defend their rights, to propound their grievances, and to provide a remedy for them, as where they have placed their truſt, their natural confidence ought to be: And the proper charge and office of their repreſentatives is to be a check upon pernicious counſels given by civil Counſellors to the Crown. The beſt compliment that can be paid to ſuch a ſituation is, that it is not a hopeleſs ſtate. Neither ought it to diminiſh in our eyes the value of the inſtitution of Parliaments, the very term of endurance of which, as well as their Conſtitution, is a ſecurity againſt an extremity of power in them to do miſchief: And if they are *freely* and *prudently* choſen, they cannot *naturally* be ſuppoſed to fall under ſuch an influence, as to require the interpoſition of any external or extraordinary remedy.

The effects of an unconſtitutional power, however, muſt become much more dangerous, when the pretenſions to it are perſiſted in, and the conſtitutional

ſtitutional remedy is not applied to rectify the wrongs that are done by it. This may prove a very dreadful ſituation, and the conſequence may lead to dangers of the firſt magnitude. I cannot betray the cauſe of Liberty ſo far as to ſay, that even for theſe, if unhappily they were to exiſt, there is no cure. But that is indeed a very ſerious ſubject of contemplation. There is a line there, which it does not belong to theory to draw. Neceſſity, and neceſſity *extreme* only, can point it out: And terrible muſt be the rents that let light enough in to make this ſecret legible. It is the *knowledge of good and evil*, unhappily learned only by eating of the forbidden fruit in a very great quantity *.

Pre-eminent

* I am not, however, ſo ſhy as the able and learned Doctor Blackſtone, of adopting the opinion of the great Mr. Locke upon this delicate ſubject. For it is the opinion naturally taught by a ſenſe of Engliſh liberty, and read in the unwritten volume of the Conſtitution, by thoſe who never ſtudied Treatiſes on Government. While I have the fundamental principles of the Conſtitution with me, and the great Charter of our Liberties written in the Revolution, I ſcruple not to head the footſteps of Mr. Locke, who was one of the greateſt oracles of the Conſtitution, of civil policy, and of the divine Laws of Nature that are written in the Heart of Man, as the original code of his unalienable rights. Neither am I afraid to ſpeak out what every Engliſhman may, and ought to think, that there is a remedy for the very worſt ſituation that things can be brought to: And I ſhall never ſhun the opportunity of ſaying it, when Queſtions of Liberty, and that concern the vitals of the Conſtitution are agitated; which are the only times that people will give themſelves the pains to think about it. Then may that be ſaid, which never ought to be unknown to the People of this Conntry, nor forgotten by them.

Mr. Locke certainly does ſuppoſe (and it was only ſuppoſing what we all know has happened;) that there may be a diſſolution of the Government: And it is remarkable that he ranks among thoſe breaches of truſt in the executive magiſtrate, which (according to what Mr. Blackſtone calls Mr. Locke's *notions*,) amount to a diſſolution of the Government, *not only* all unconſtitutional means uſed to corrupt the Repreſentatives, and influence Electors;

Pre-eminent in difficulty may that remedy be ſaid to be, which is the laſt effort of oppreſſed Liberty. And before turning to which all ordinary means muſt have failed of bringing to juſtice thoſe criminal ſubjects, who by their influence and their

 power,

Electors; but alſo any method taken to *preſcribe what manner of Perſons ſhall be choſen.* " For," (ſays he) " thus to regulate " *Candidates* and Electors, and *new model the ways of Election*, " what is it but to cut up the Government by the roots, and poi- " ſon the very fountain of publick ſecurity." The poſition of Mr. Locke, which Mr. Blackſtone ſays, however juſt it may be in theory, he cannot *adopt*, nor argue from it, under any diſpenſation of Government actually exiſting, is this, " that there re- " mains ſtill inherent in the People a ſupreme power to remove " or alter the legiſlative, when they find the legiſlative act con- " trary to the truſt repoſed in them: For when ſuch truſt is " abuſed, it is thereby forfeited, and devolves to thoſe who " gave it."

But with the good Doctor's leave, if we cannot adopt or argue on this concluſion of Mr. Locke's under any diſpenſation of Government actually ſubſiſting, I know not when we ſhall: For if the Government were to come to a *diſſolving* ſtate, which muſt precede an actual diſſolution, we ſhould not *argue* but *act* upon the principles aſſerted by Mr. Locke: And I know nothing ſo effectual to prevent the neceſſity of acting upon them, as our being all very well acquainted with them, and feeling their proper energy. For which reaſon there may be very fit occaſions for arguing upon theſe fundamental *notions*, as Dr. Blackſtone would call them, which lie below all other foundations. And, however well the important poſt of liberty may be ſecured at preſent, it can never hurt lawful Government, that we ſometimes ſpeak of the cure for tyranny, to which all unlawful uſurpations of power, and invaſions of the Conſtitution, are but the approaches.

I ſhall therefore take the liberty on this occaſion to ſay, that I preſume it is ſound doctrine, that Parliament itſelf has not a power to make a Law deſtructive of the liberty of the People, becauſe they are ſent to Parliament to preſerve and not to deſtroy the People's rights. And if the whole three branches of the ſupreme power of Government were to combine to ſubvert the Conſtitution, which is their own foundation, and to overthrow the rights and liberties of the People, there is in this Conſtitution a reſerve, in the firſt principles of all power, of a remedy, though it is an awful one, for ſo tremendous an evil. For our liberties and privileges muſt live when we are dead. Natu-

ral

power, their counſels or their conduct, have been the baſe inſtruments of overturning the rights of the People. But all invaſions of the Conſtitution have a tendency to open the acceſs to that ſtate of things, which might call forth the moſt difficult and

ral liberty is the firſt ſtate of all men; but civil liberty is the ſecond nature of Engliſhmen.

When the ends of Government are deſtroyed by the abuſe of it, the rights of Government ceaſe, and power reverts to its own fountain. When the original compact is broken, the bonds of the Conſtitution are diſſolved, and the body politick reſolves into its conſtituent elements. In that extremity, and till ſuch an extremity, the laſt remedy is not to be looked to; in that hour of neceſſity, firſt principles, the virtue of which can never evaporate, ſtep forth with their ſupreme authority to repair the breaches, and reſtore foundations.

That is an unnatural ſtate of things, and therefore is painful. The Conſtitution feels the anguiſh of an univerſal diſſolution. But ſhe is then in a parturient ſtate, and from the teeming womb of her diſſolving frame, under favourable auſpices, the fair Child of Liberty is, in the propitious moment, born again, and cloathed afreſh with the beautiful array of a legal Government.

God forbid! that we, or our poſterity, ſhould ever ſee this terrible ſcene, or ſhare in the agonies of ſuch a painful regeneration. Who, ſo loſt to humanity and to the welfare of mankind, as to occaſion or invite the dread appeal made by the Counteſs of Arundel, who in the face of Henry the IIId. firſt invoked the *broken liberties* of England, and then ſaid, "therefore I, though "a woman, with all your natural Subjects, do appeal from you "to the Tribunal of God, the great and terrible Judge, let him "revenge us." At which words, as the Hiſtorian relates, the tyrannical King was confounded, and held his peace, becauſe his own conſcience told him ſhe ſpoke no more than the truth. But the principle of lawful reſiſtance, as the Avenger of forfeited Allegiance, and of an infracted Conſtitution, is the great ballancing power of this Government, and its own force is everlaſting.

This is the myſtery; which is hid from many Ages and Generations; and happieſt theſe from whom it is hid; but it has been too often *revealed*. It is the great *arcanum* of the Conſtitution, which lies locked up under all the bolts and bars with which the love of Ourſelves, the love of our Country, the love of Poſterity, can faſten it in; and nothing but the ſame Keys can unlock the ſolemn Temple in which it is depoſited; a Temple not to be approached without reverend Incence to the God of Liberty, whoſe unconſecrated Prieſts ſacrifice her devoted Enemies to the injured rights of Men born to be free.

and diſmal of all remedies. And thoſe who are not properly alarmed at ſmaller dangers, take the readieſt courſe to bring on the greateſt evils and miſchiefs, to which, in their nature or conſequences they can lead. To ſuch a calamity, were it to happen, thoſe doctrines would be deemed acceſſary, which, upon falſe Principles, and by a manifeſt perverſion of the Law, attempt to eſtabliſh an unconſtitutional Power, deſtructive in its nature, difficult in its remedy, and that in its conſequences may prove ſubverſive of our Liberties.

Here we ſhould ſhut up the Argument, but the head of danger naturally turns our eyes from *Argument* to *Evidence*; and the Subject we have been upon, hardly permits us to quit it, without taking ſome notice of preſent appearances, which are the actual conſequences of the doctrine we have been proving to be dangerous as well as erroneous.

Had we nothing elſe to judge from but the immediate effects which we behold, the danger of this Doctrine, and of the Power for a prop to which it is coined, is too glaring to be diſputed. The effects which we ſee, and to ſee which, we have but to keep our eyes open, cannot give favourable impreſſions of the Cauſe from which they proceed. A meaſure which the whole Nation diſlikes, and cries out againſt, does not beſpeak a commendation of the principles by which it is juſtified. And will an obſtinate adherence to ſuch Principles, and a purſuit of ſuch Meaſures produce no danger? It is not natural motions, but ſtrains occaſioned by wry ſteps, that are accompanied with ſwellings; And if theſe are not timely reduced by emollients, they feſter, and prove dangerous to the Body.

I do not know if Meaſures, which force to juſt Complaints, and extort lawful Remonſtrances are guiltleſs, but I am ſure the actual ſtate of Govern-

ment, which for ſome years has diſtreſſed this Country, and rendered us not only diſturbed at home, but contemptible abroad, and has, I ſuſpect, made us as unſecure without, as we are unquiet within, is not innocent even of thoſe various and repeated infamous Outrages, committed by different aſſociations of a lawleſs Banditti, who are the terror of the quiet and peaceable Subject, whoſe habitations and property they invade, and even aſſault their Lives, trampling upon the Laws of their Country, and rebelling againſt all Order and Government. Some men, like ſacrilegious Thieves, who ſteal in midſt of a conflagration, are wicked enough to take encouragement from juſt and legal Remonſtrances, for invaſions and breaches of the Law, to ſet all Law at defiance, and throw off all ſubjection, thinking it ſafe to deſpiſe and reſiſt lawful Government, when they hear improper acts of exertions of Power complained of in a legal way. The truth is, Miſgovernment is the greateſt foe to the reſpect due to Government: And ſuch unhallowed Proceedings are not the leaſt mortifying circumſtances that attend times of general Complaint, however juſt and neceſſary, nor among the ſmalleſt dangers that accompany meaſures which are the cauſe of publick diſſatisfaction and ſpreading diſcontent. It could not be ſaid with more reaſon, of the people of whom it was ſaid, than it may be of us, *Externis victoriis aliena, civilibus etiam noſtra conſumere didicimus.*

One thing is viſible, the Kingdom at this moment is in labour, and daily brings forth Petitions, Complaints, Murmurings, Apprehenſions. Theſe are ſerious things in ſuch a country as this. Nobody knows to what they may grow: And thoſe who would moſt wiſh to prevent bad conſequences, can leaſt foretell what may happen. It is none of my intention to excite Sedition and Tumult. *Motos*

præſtat

præstat componere fluctus. But indeed there is no need of writing to raiſe a flame in the Kingdom: The fire already burns. Nor is it at all ſurprizing, if there is any juſtice in the reflection which we quoted from the Hiſtorian. Rapin did not write the Hiſtory of the Middleſex Election, nor compoſe his Work from the news of our daily Papers, but he has told us, as we have ſeen, that it is impoſſible a Nation can ſee their Liberties in the hands of men whom they have not themſelves freely choſen, without deſiring to be delivered from ſuch oppreſſion.

A Fact, even in a ſingle inſtance, correſponding with ſuch an obſervation, is a juſt foundation of Complaint. But principles attempted to be eſtabliſhed, that promiſe nothing but as many repetitions of the ſame Act, as emergencies may at any time require, and that cut up by the roots the Rights that have been injured—Theſe are not to be endured.

It is not mere empty noiſe and clamour that we hear, which may be raiſed we know not how, and goes as it came, becauſe there is no ground for it; like a ſudden blaze which quickly dies away for want of fuel to ſupport it. The buſineſs in hand is a matter of *Right*, upon which men can judge, and that wiſe men will ponder, as it concerns every Member of the Common-wealth. There are not wanting, as Sir Edward Deering ſaid, men of birth, quality, and fortune, who have been of good aſſiſtance to the ſtate, and are no ways obnoxious to it, who ſtand forth upon this occaſion, in ſupport of what they aſſert to be the Rights and Privileges of the people of England; and the opinions of ſuch men muſt have weight with others leſs able to judge of the wrong, but equally liable to ſuffer by it.

Conſidering

Conſidering the perſon from whom it came, it was not an unſenſible anſwer which Gallio the Roman Deputy of Achaia, (a man whoſe character it was, that *he cared for none of theſe things* which did not immediately concern his own Government) gave, when the Jews brought St. Paul before his Judgment Seat. " If it were a matter of wrong, " O ye Jews, reaſon would that I ſhould bear with " you, but if it be a queſtion of your Law, look " ye to it." This buſineſs in hand is a great *matter of wrong*, and Reaſon will, that Repreſentations and Remonſtrances upon it ſhould be borne with, It is a great *Queſtion of our Law*, and the People ought to look to it. And if the Miniſters of Government do not alſo look to it, they will ill look to themſelves. For Miniſters are but the ſervants of the People, and if the People are not ſerved, much more if they are hurt, they will not only not ſupport, but they will oppoſe, till they pull down thoſe who do not ſerve them.

It has been well obſerved, that it is an error to which thoſe at the Helm are frequently liable, to diſregard the complaints of the People. Being always ſurrounded with Flatterers, or ignorant of what paſſes any where but at Court, they are apt to imagine, that having a few of the great men for them, the reſt of the people are to be counted as nothing. But it always has happened, and it always will happen in ſuch a country as this, that thoſe who reaſon in this manner, find at length to their coſt, that the great men, and Kings themſelves, have no more power than private perſons, when unſupported by the People,

It is even very liable to miſtake, to judge, in all Caſes, of the ſentiments of the People by thoſe of their Repreſentatives. For as the Repreſentatives debate and determine upon matters brought before them without Inſtructions from thoſe they repreſent,

preſent, their Reſolves, in one ſenſe, can be conſidered but as private opinions, though while they are within the bounds of their legal Powers, and upon matters concerning which, they have, by the Conſtitution, a proper Juriſdiction, the extent of which is not exceeded, their Reſolutions are of force to bind the People. Upon which account it is, that we ſee from Hiſtory, the people have often appealed from the deciſions of Parliaments, when thought too prejudicial to the Nation, and have, in Caſes of the laſt extremity, even appealed to arms. But the Conſtitution is now happily armed with remedies which ſuperſede thoſe cauſtick medicines uſed in the rude and barbarous times.

In ſuch Caſes, Miniſters who have deluded themſelves in a fatal ſecurity, as to the ſentiments of the People, perceive, when it is too late, that the ſmall numbers they had gained, are a weak defence againſt the fury of an enraged Nation. This was remarkably verified after theſe Kingdoms were happily and ſeaſonably delivered from the dominion of Queen Anne's Tory Parliament and Miniſtry. For a while, five or ſix hundred perſons who compoſe a Parliament, and perhaps ſome hundreds of Magiſtrates in Towns, and a few Freeholders in Counties, who, by ways and means, may be got upon particular occaſions to preſent Addreſſes of Approbation, may be paſſed upon the world as ſpeaking the ſenſe of the body of the Nation, and the reſt be reckoned as nothing: But when the critical time comes, the greater number muſt be taken into the account, and then that of thoſe who are in office and in truſt, appears to be infinitely ſmall in compariſon of the whole.

Such Reflections as theſe we would not puſh to an extravagant length, nor would we be underſtood to point at any improper applications of them. But they are the truths of Hiſtory, and the experience

rience of paſt times: And it muſt be a ſerious wiſh, rather than a vain reproach, that Miniſters would, in place of ſome of the idle and diſſipating, not to ſay ſhameful and flagitious amuſements, by which only ſome endeavour to qualify themſelves for their important ſituations, as if the great concerns of the Nation were leſs than Play, and to be more lightly ſported with than betts ſet upon the dice —if inſtead of theſe they would try to learn both what this Country has done, and what ſhe has ſuffered. By that means they would certainly conſult their own intereſt more, and ſerve their Country better. They would, on ſuch an occaſion as this, know the importance of the ſenſe of the Nation, and the value of national opinions and inclinations.

The preſent queſtion is, in a peculiar ſenſe, a popular queſtion, and there is no denying of it. The people ſupport their own Rights. We might have gueſſed, if we had not ſeen it, upon what ſide the Popular Opinion would be. But Popular Opinions are no objects of contempt. Even ſuch a Tool of a Court as Bacon, could tell his Maſter upon a very grave and weighty occaſion, "That "Popular Opinions are to be regarded, and that "Kings had always done ſo."

It was the Parliamentary Language of old, *the* PEOPLE OF "ENGLAND MUST BE SATISFIED." Till they are, they will not be quiet. *Flamma per incenſas citius ſedetur ariſtas.* We may be told of the Mob Petitioners of London, of Middleſex, Yorkſhire, &c. But I will tell thoſe who talk in that ſtile, ſuch Mobs as theſe Petitions come from, will decide any controverſy that can be raiſed in England, if the gauntlet is thrown. And whoever they are, that make a mock of Petitioners, they may depend upon it, the Standard of Liberty will be followed, when the Banner of Power has but

few to attend it; and those more likely to desert their colours, than to support the cause in a day of trial: Men love Freedom, and Liberty is an *Ætna* which burns in the breasts of Englishmen, with an extreme hatred towards those who oppose it.

One cannot help being sorry to see the reign of the first *native* Prince of the House of Brunswick, disgraced, as it has been, with complaints of invasions of Liberty. Under the benign government of his Majesty's two illustrious ancestors, whose memory these Nations revere, the bitterest enemies of the Protestant succession could not, even in the days of the most malignant disaffection, and when every corner was ransacked for ground of clamour, bring such an accusation. These Princes were the glorious protectors of the liberties of Europe, and the faithful guardians of the Rights and Privileges of these kingdoms. They knew that the Crown they wore, was the gift of that Liberty, which it was given to maintain.

His present Majesty also most graciously assured his people, when he first ascended the Throne, that their Liberties were as dear to him as any Jewel of his Crown; and, indeed, they are the brightest Jewel in it. Nevertheless, Complaints are not new—Complaints of such an impression, that for the pattern of them, we must go back beyond the Revolution—Complaints that cannot but be grievous to the real friends of the Hanover Family. It is, however, a happy circumstance, that even Complaints of this sort do not reach the justice of his Majesty's Royal Dispositions, or affect the loyal affection of his faithful subjects. To His Majesty's own paternal goodness, will chearfully and with gratitude be attributed the acts of his government in favour of the Liberty of the Subject. The Constitution tells us where to lay the blame of Measures that are injurious to the Rights of the

People, and of a tendency to rob his Majeſty of the hearts of his Subjects, which are the beſt garriſon of the kingdom. We know where Reſponſibility is; and we know the power that can make thoſe who are reſponſible, amenable, and from which, no Power nor Protection is able to ſecure the greateſt, if once it is effectually rouſed to call the Criminal to account. Nor let any one draw aſide the veil that hides the Throne in ſacred Reverence. His Majeſty may adopt the words of his illuſtrious Predeceſſor Queen Elizabeth, who was not behind in penetration with any Prince whoever wore her Crown, in her anſwer to the Commons of England, on preſenting their Thanks for annulling Monopolies, which had become a National Evil; "I beſeech you," ſaid that great Queen, "that whatever Miſdemeanors and Miſcarriages "others are guilty of, by their falſe Suggeſtions "may not be imputed to me. Let the teſtimony "of a clear Conſcience, entirely, in all reſpects, "excuſe me. You are not ignorant, that Princes "ſervants are oftentimes too much ſet upon their "own private advantage; that the truth is fre"quently concealed from Princes, and they can"not themſelves look narrowly into all things, "upon whoſe ſhoulders lieth continually the heavy "weight of the greateſt and moſt important af"fairs."

Theſe are the Miniſters of the Crown, and of theſe only, the people are to think when they complain. It is an old ſaying, but the proof of it is no novelty, nor are the examples of it likely ever to be ſcarce, *Nemo imperium flagitio quæſitum bonis artibus exercuit.* Men are too fond of Power, and Miniſters truſt too much to it, however they got it into their hands, to be over ſcrupulous about the means of preſerving it, when theſe are dictated by the neceſſity of the Conditions on which

which it is held. Evil devices to cure blunders, are generally the child of the ſame imbecillity that committed them. When Governors, who cannot conduct themſelves, want extraordinary remedies on particular emergencies, they are eaſily led into ſcrapes, by conſulting the ſtate quacks which ſuch ſorts of Miniſters imploy; for theſe poor undertakers are but a kind of horſe doctors, who will preſcribe very violent phyſick, without conſidering whether the conſtitution can bear the ſhock it will occaſion; ſome late meaſures, if I miſtake not, are very much of this ſtanp; and the writings by which they have been defended, to me appear to have the ſame colour.

Miniſterial meaſures, we know, muſt not only be ſupported, but it is underſtood to be neceſſary to juſtify them, however raſhly undertaken, and though ſincerely repented of in ſecret, when the conſequences are ſeen. But nothing but pure madneſs could lead to juſtify an unconſtitutional Act, by laborious endeavours to cram down our throats principles pregnant with the worſt of evils, and infinitely more alarming than any ſingle inſtance of miſconduct which they could be uſed to palliate. It is not by ſuch doctrines as have been broached, whatever pains may have been taken to ſpread the vehicles which convey them, that the flame which has been raiſed, is to be quenched. Gentlemen are miſtaken, if they think the people a fit ſubject for ſuch impoſition to work upon. Our privileges are not to be written away, the conſtitution is not to be conquered by one aſſault. The Acts of Government cannot prevail over the principles of the Conſtitution; nor will the rights of the people yield to be expedients of any adminiſtration. If writers, whoſe works we have ſeen, conceived the People of England were ſuch fools as to ſwallow the poiſon they have ad-

miniſtered, their conception will aſſuredly breed nothing but their own confuſion, and the ruin of thoſe in whoſe ſervice their labours have been employed.

The cry of the Nation is, *Legis præſidium quod iniquitas eripuit reſtituatis:* And a much better ſervice would have been done to the offenders, as well as to the people whoſe rights have been injured, by counſelling to reſtore what had been taken away, rather than aſſiſting to defend the injury. It is the ſecond part of true wiſdom to mend an error as ſoon as poſſible. And upon this ſubject alſo inſtruction may be had from the ſame Queen Elizabeth, who knew the weight of the Scepter ſhe ſwayed, as well as any Prince that ever ſat upon the Throne of England, in her ſpeech to the Commons already alluded to, "I owe you my "hearty thanks and commendations for your ſin"gular good will towards me; not only in your "hearts and thoughts, but which you have o"penly expreſſed and declared, whereby you have "recalled me from an error proceeding from my "ignorance, not my will.—Theſe things had un"deſervedly turned to my diſgrace, to whom no"thing is more dear than the ſafety and love of "my People.—The ſplendor of regal Majeſty "hath not ſo blinded mine eyes, that licentious "power ſhould prevail with me more than juſ"tice.—The glory of the name of a King may "deceive Princes that know not how to rule, as "gilded pills may deceive a ſick patient. But "I am none of thoſe Princes: For I know that "the Common-wealth is to be governed for the "good and advantage of thoſe that are committed "to me, not of myſelf to whom it is entruſted; "and that an account is one day to be given be"fore another judgment ſeat. I think myſelf moſt "happy, that, by God's aſſiſtance, I have hitherto ſo proſpe-

"prosperously governed the Common-wealth in "all respects; and that I have such subjects, as "for their good I would willingly leave both "kingdom and life also."

Ministers, who at any time despise petitions and complaints of the People, will not also despise the consequences to themselves. It is long since the liberties of England had a sacrifice: But it has been thought by very wise men, that it does look very like as if judgment would at last begin. The People of England is a beast with many heads, and if once they are angered, they rage like a tumultuous sea. It is to no purpose to complain of their being susceptible of commotion, while causes of discontent are not kept at a distance. There are humours in the political body, as well as in the natural, and if they are not removed but stirred, they will do hurt. The more easily the People are exasperated, the more criminal it is to provoke them, because if they are driven to extremes, it may prove true which has been said in a particular stile of language, that the midwifery of any occasion will serve to produce the prodigious issues of their madness. If the country, as is sometimes alledged, is ready enough to bring forth troubles of itself without sowing, it is very needless to throw the seeds of them into the ground, only to make the harvest more plentifull.

In this nation the reproach of invaded liberty will not be suffered to remain, whatever may be necessary to wipe it away. And if there is a man, or a minister in this country, of whom, in any sense, or in any extent of the words, it can be said, *Vitia, quibus solis gloriatur, sunt evertere imperium, etiam cum imperatoris amicum ageret*, it would be but kind to whisper into his ear, the admonition given to a Roman Governour, to incline

incline him to treat the People with goodneſs and lenity, *Imperaturus es hominibus qui nec totam ſervitutem pati poſſunt.* But as for the Liberties of England, they are too firmly eſtabliſhed to be eaſily deſtroyed. One may venture to propheſy, even in prophetick language, "That in that day, when "their enemies lay ſiege againſt them, they will "prove a burthenſome ſtone, that will cut in "pieces all thoſe who are gathered together "againſt them." *Convelli ſine exitio convellentium non poſſunt.*

Such are the reflections of one, no matter who, if he is but a ſincere Lover of his Country. Whatever weight is in them, is derived from the ſubject; for nothing could be ſaid to add to the weight of it. I did not follow the example of the two Authors, whoſe treatiſes I undertook to conſider, by prefacing this Diſſertation with a vindication of my Motives; and I ſhall not add to the length of it, which aſtoniſhes myſelf, by explaining them. Theſe, in all caſes, are beſt to be gathered from the tenor of Writings themſelves: And they are of mighty little concern to the Publick, and of ſtill leſs importance to the matter that has been handled. Thus much I ſhall only ſay, that if the ſubject had not made a ſtrong impreſſion upon my own mind, I hardly think any thing elſe could have prevailed upon me to have entered into ſuch a diſcuſſion of it. And I am not conſcious of being too apt to embrace opinions without reaſon; or of being ſo ductile, as to ſubmit to influence, which either ſuperſedes or renders it very convenient to ſtifle thoſe that are real. Whether what has been ſaid, has come from conviction or no, ſhall be left to be decided by the matter itſelf, and the manner in which it has been treated.

I have endeavoured to treat the Subject in ſuch a manner, as I thought, became the dignity and

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the gravity of it. I do not think I have writ in the Stile or Temper of Party: I had no temptation nor invitation, no call nor obligation to do it: And to avoid it, I paſſed over thoſe parts of the two Performances I have had under my eye, which were pointed to any particular quarter or object, of a tendency to excite heat or ill-humour, of which there are not wanting in them both.

The ſubject itſelf is ſufficient to make a very cool man warm; and on the ſide of it, which gains my affections, the moſt moderate man may be earneſt, and deſpiſe the imputation of being a Partizan.

A wiſe man will firſt covet his own approbation. Faction, fire-brands, and incendiaries, every good man will deteſt: And if he admires, it cannot be becauſe he is in love with, Time-ſervers and Weather-cocks, who can change Opinions with the ſame facility that they ſhift Sides; one day the tools of Tyranny, and the next, inrolled among the Friends of Liberty, as their intereſt, their ambition, their reſentments, proſpects or purſuits, drive or direct. An honeſt man, no Party will ever make ſay what he does not think, or advance what he would either be aſhamed to avow, or afraid to juſtify: Nor will any Connection or Attachment ſeduce him to act inconſiſtently with himſelf. But, inconſiſtent with his own ſafety, as well as duty, does every man in this Country act, who behaves otherwiſe than as a warm friend of the Revolution ſettlement of the Crown, and a zealous ſupporter of the Liberties of theſe Kingdoms, of which that is the grand ſecurity.

In defence of the Conſtitution has been lent the feeble aid of the Conſiderations contained in theſe ſheets. To fight for the Conſtitution, is a conteſt, in which it is no victory to overcome. *Cruentam atque luctuoſam victoriam hoſtibus relinquimus.—Pro patria,*

patria, pro libertate certamus. In the Cauſe of Liberty, and to thoſe who enjoy it, any one of the People may ſpeak, as every one of them muſt ſhare either in the prejudice or advantage of any meaſure that is taken, ſo far as it affects the Commonwealth in general.——*Nunquam verba feci pro vobis ſolicitior——neque facundiam exercui libertatem Populi armisnon adfirmavi——ſed quia verba apud vos plurimum valent, ſtatui pauca differere; quæ profligato bello utilius ſit vobis audiſſe quam nobis dixiſſe.*

To the People of this great Country, I have only further to preſent, as a Model, the example and the Exhortation of an antient *Briton*, in a Speech made about 1700 years ago, with which he encouraged his Countrymen to repel the Roman yoke; and which the Roman Hiſtorian, feeling it's Energy and Power, has tranſmitted, to the Honour of him who made it; "Let us," ſaid he, "act as Men that hold their Liberty as well as "their Glory dear," adding, as I ſhall conclude, BRITANNI AGNOSCENT SUAM CAUSAM.

FINIS.